No. 2890.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ROLLIE A. YORK and ED. KARR,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

On Writ of Error to the District Court of the United States for the Southern Division of the Northern District of California, First Division.

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Of Counsel.

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(See note at bottom of this page.*)

STATEMENT OF THE CASE.

The plaintiffs in error, Rollie A. York and Ed. Karr (hereinafter designated as "defendants") were

*NOTE: In referring to pages of the Transcript of Record, we refer to the large numbers on the extreme lower right hand corner of the pages in *blue ink,* and not to the typewritten numbers in the middle of the pages.

Furthermore, to assist and for the convenience of the Court, inasmuch as the Transcript of Record was not printed, owing to the indigence of the defendants, we have prepared an index of the witnesses who testified for the prosecution and for the defendants with the pages of their direct, cross and redirect examinations, which will be found in the Appendix to this Opening Brief.

convicted in the court below of the offense of conspiracy to violate a law of the United States as denounced by Section 37 of the Criminal Code. They were each sentenced to imprisonment in McNeil's Island, Washington, for the term of two years. (See Transcript of Record, p. 363.)

The indictment charged that they had conspired *to pass, not manufacture,* counterfeit five dollar gold pieces and alleged some eight overt acts in furtherance of the conspiracy. (Transcript of Record, pp. 2-8.)

They were recommended to the mercy of the court by the jury, but this recommendation was ignored by the trial Judge, who imposed the extreme penalty of two years' imprisonment prescribed by the statute. (See Transcript of Record, p. 364.)

The evidence against the defendants—of the existence of any conspiracy to pass counterfeit five dollar gold pieces—was purely circumstantial. There was no direct, nor, we add, even satisfactory evidence, of the passing, or attempting to pass, or possession of any counterfeit five dollar gold pieces, by either defendant, *with any intent to defraud* the persons named in the indictment.

It should be explained, at the very outset, that the counterfeit $5 gold pieces, which, it was claimed by the prosecution, the defendants had passed or attempted to pass on the two or three occasions developed by the evidence, were so perfect in their resemblance and similitude to the genuine coin that they easily deceived anyone.

Even cashiers of banks were imposed upon. As

Charles A. McCarthy, receiving teller of the Central National Bank in Oakland, testified: "Well, at our last report, the last half year that we turned in our annual report, we sent to San Francisco some $500 worth of these, or, rather, approximately $500, if they were good, but they were sent to the First National Bank in San Francisco, who took them to the Mint, I presume, and got there whatever gold value there was in them, and returned the same to us (To Mr. Preston): That came from our institution; yes. We had somewhere about approximately $500 worth of these, if they were in real value. Between, we will say, the middle of January—starting in about February or March of last year—and accumulating until about the first of July or the latter part of June; they were sent to San Francisco for collection, that is, we turned them over to them, and they apparently, I imagine, not knowing much about that—but our bank in San Francisco, our correspondent, must have brought them to the Mint, or some place, and got their gold value for them and returned the same to us. (To Mr. Woodworth): This was $500 for that one half fiscal year. To my knowledge, the coins that were found in the trays at different times, I would imagine there were sometimes three or four taken in in one day and discovered." (Transcript of Record, pp. 229-230, 232, 233, 234.)

Michael Finnell, a Captain of Police at Stockton, who searched and interrogated the defendants and then released them, testified:

"There was on my part considerable doubt as

> to the nature of this coin (referring to a $5 gold piece attempted to be passed in Stockton by defendant Karr on saloon keeper Eickhoff and afterwards passed by defendant Karr on another saloon keeper named Jones), as to whether it was genuine or counterfeit." (Transcript of Record, p. 115.)

This was after the coin had been subjected to the strictest scrutiny by the police officers at Stockton.

Therefore, we ask, if police officers, after a careful examination and even bank cashiers, could not tell if the coin was counterfeit and were imposed upon, why were not the defendants, men in the ordinary walks of life, also imposed upon?

A mass of evidence was permitted to be introduced, in an endeavor on the part of the prosecution to prove guilty knowledge or scienter on the part of both defendants.

Before the defendants could be convicted—and, this being a conspiracy charge, neither could be convicted without the other—the evidence, manifestly, must perforce establish beyond all reasonable doubt an intent to defraud—a guilty knowledge of the spuriousness of the coins—on the part of both of the defendants.

We do not believe that a perusal of the record in this case will satisfy this appellate tribunal that there was sufficient satisfactory evidence of any conspiracy between the defendants or of any intent to defraud on the part of both of the defendants as charged in the indictment.

Much incompetent, immaterial, irrelevant and highly prejudicial evidence was permitted to be introduced by the trial court. This was further aggra-

vated, to the substantial prejudice of the defendants, by grave acts of misconduct committed during the trial, such as permitting the jurors to experiment, in open court, over the protests of counsel for defendants, with articles *not admitted in evidence,* the experiments being undertaken by the jurors to determine whether a certain block of iron, claimed to have been found in the basement of one of the defendants' homes—defendant Karr—(long after he had moved away from there and long after the expiration of the alleged conspiracy) might be used in counterfeiting five dollar gold pieces.

In this connection, it should be impressed upon this Appellate Court, at the outset, that the indictment did not charge that the defendants had conspired *to make or to manufacture* counterfeit money.

Even Chief Secret Service Agent Moffitt conceded that the defendants had nothing to do with the making of the coins. He testified:

> "I said according to Mr. Foster—I was going on Mr. Foster's theory,—that is, from reading his report—Mr. Foster had reported these men had been engaged in the railroad business and did not think that they were skilful enough to make these coins. That was the theory that I was going on, but I believe that some other man had made the coins and that they were simply the tools of the maker and were passing it." (Transcript of Record, pp. 85-86, 298.)

Furthermore, the trial court committed grave and substantial error in stating in the presence of the jury, when counsel for defendants was endeavoring to have

a certain letter written by defendant York introduced in evidence as part and in explanation of a previous conversation called out by the prosecution in presenting its case in chief: "The Court: *My opinion is—it may be an old fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote;* it may be self-serving." (Transcript of Record, p. 236.)

These, and other equally, grave irregularities, combined with an entirely too broad and liberal admission of a mass of circumstantial, incompetent, irrelevant and immaterial evidence in favor of the prosecution, undoubtedly induced the jury, as we believe, to return a compromise verdict of guilty, recommending the defendants to leniency.

We confidently believe that a perusal of the far-fetched and flimsy mass of circumstantial evidence in the record will lead this Court to apply the well settled rule of Appellate Courts, in criminal cases, that "where all the substantial evidence is as consistent with innocence as with guilt, the Appellate Court should reverse a judgment of conviction."

Union Pac. Coal Co. v. *U. S.*, 173 Fed. 737;
Wright v. *U. S.*, 227 Fed. 855;
Isbell v *U. S.*, 227 Fed. 788.

In the case at bar, the substantial evidence is as consistent with innocence as it is with guilt, and, in our judgment, more consistent with innocence than with guilt and, for that reason, if for no other, the verdict should be set aside and a new trial granted.

At all events, we are convinced that the jury never would have returned the compromise verdict of "guilty with recommendation to the Court for leniency," save for the grave and highly prejudicial acts of misconduct committed during the trial. (Transcript of Record, p. 364.)

We set out, very briefly, an epitome of the indictment and evidence.

The indictment charges a conspiracy between the defendants to pass, *not to manufacture,* counterfeit five dollar gold pieces. No attempt was made by the prosecution to connect anyone else with the alleged conspiracy. (Transcript of Record, pp. 2-8.)

The indictment charges the conspiracy to have been formed and entered into on January 1, 1915, at Oakland, California. It sets out eight overt acts—committed—not by both of the defendants together—but by each of the defendants separately at different times and places, as follows:

(1)

By defendant *York,* attempt to pass on January 15, 1915, at Oakland, California, on Harry Collinbell, a bartender, a counterfeit five dollar gold piece. (Transcript of Record, pp. 3-4.)

(2)

By defendant *York,* the possession, on June 15, 1915, at Oakland, California, of one counterfeit five

dollar gold piece with intent to defraud Robert Mulholland, a saloon keeper. (Transcript of Record, pp. 4-5.)

(3)

By defendant *York,* passing on the same Robert Mulholland, on June 15, 1915, at Oakland, California, a counterfeit five dollar gold piece. (Transcript of Record, p. 5.)

> (Note: The last two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what extreme the prosecution went in carving up offenses and multiplying overt acts.)

(4)

By defendant *Karr,* attempt to pass, on July 9, 1915, on Robert Eickhoff, a saloon keeper, at Stockton, California, a counterfeit five dollar gold piece. (Transcript of Record, pp. 5-6.)

(5)

By defendant *Karr,* the possession, on July 9, 1915, at Stockton, California, of one counterfeit five dollar gold piece, with intent to defraud the same Robert Eickhoff, a saloon keeper at Stockton, California. (Transcript of Record, p. 7.)

> (Note: The two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what ex-

treme the prosecution went in carving up offenses and multiplying overt acts.)

(6)

By defendant *Karr,* passing, on July 9, 1915, at Stockton, California, a counterfeit five dollar gold piece on Newton Jones, a bartender. (Transcript of Record, pp. 6-7.)

(7)

By defendant *Karr,* the possession, on July 9, 1915, at Stockton, California, of one counterfeit five dollar gold piece, with intent to defraud the same Newton Jones, a bartender. (Transcript of Record, pp. 7-8.)

(Note: The two overt acts just mentioned really relate to one and the same transaction, as, of course, in order to pass there must have been a possession, and simply serves to show to what extreme the prosecution went in carving up offenses and multiplying overt acts.)

(8)

By defendants York and Karr, the possession, on July 9, 1915, at Stockton, Calfornia, of 27 counterfeit five dollar gold pieces with intent to defraud certain persons unknown. (Transcript of Record, p. 8.) This accusation is absurd, because neither had possession of any one of these 27 counterfeit coins unless we indulge in the wildest dreams of a detective's fancy.

It will be observed that each of these overt acts were alleged with all of the detail and particularity of executed felonies. In other words, the overt acts, as alleged, were consummated offenses committed by each

of the defendants separately in furtherance of the conspiracy.

The evidence discloses that Ed. Karr was 34 years of age (in 1915), a married man, having a wife and one child, and that he and the members of his family were and are persons of respectability in Oakland, California, where he resides. (Transcript of Record, p. 128.) He produced abundant testimony as to his character, which was not disputed by the prosecution.

He, at one time, was employed by the Southern Pacific Company as a brakeman and rose to the position of conductor, but severed his connection due to some infraction of their rules. Later on, he prepared to take the examinations to become a police officer of Oakland, successfully passed and became a member of the Oakland police force. He held this position for one month and then resigned, as the salary was only $100 a month and the work—that of being out at all hours of the night—not congenial. At the time of his resignation in 1915, the "jitney" business was just developing in Oakland and had assumed promising proportions, and he and the defendant York, a friend of his, put their savings together and invested in a "jitney"—needless to add, a Ford. At first, the venture proved remunerative, but too many others entering the field, there was a substantial falling off of patronage and after several months they gave up the business and eventually sold the Ford machine. (Transcript of Record, pp. 128-131.)

The other defendant, Rollie A. York, was 31 years of age (in 1915), also married and resided in Oak-

land, California. He also established his good character, which the prosecution was unable to dispute. He and the other defendant Karr had been friends for years. He also took the examinations to become a member of the police force in Oakland, successfully passed, and served for just one month, resigning from the force to enter the "jitney" business with the defendant Karr. At the time of the overt acts alleged against him he was living with his wife in Oakland and was engaged with his wife in obtaining subscriptions for the Examiner's "Orchard and Farm," being so successful that they were awarded a valuable prize for obtaining the fourth largest number of subscriptions. The fourth prize consisted of a piano. He also had, in the month of May, 1915, won $1250 in the lottery. (Transcript of Record, pp. 251-253.)

As stated, there was absolutely no evidence of any conspiracy. The overt acts charged against the defendants were either not proved or those that were proved against the defendant Karr as having taken place in Stockton, California, on July 9, 1915, were strongly consistent with the theory of the defense *that the defendant Karr did not know that the five dollar gold piece that he gave to the bartender Eickhoff was counterfeit and that he had no intent to defraud, and the same may be said of his paying the same coin to the bartender Newton Jones almost immediately afterwards.*

In other words, what looks like a formidable indictment, consisting of many overt acts, due to the carving up or multiplication of offenses on the part of the

prosecution, is, when analyzed, reduced to two overt acts against defendant York and two against the defendant Karr.

Briefly, the evidence, or alleged evidence, against defendant York upon the first overt act alleged in the indictment showed, that although the indictment charged that defendant York had, on January 15, 1915, at Oakland, California, passed on a barkeeper named Harry Collinbell a counterfeit five dollar gold piece, the prosecution attempted to show by the witness Collinbell that the transaction really took place on the last of June or the first of July, 1915, *fully six months later.* (Transcript of Record, pp. 50-51.)

The proofs, on behalf of the defendant York, were overwhelming that Collinbell must have been mistaken, as defendant York was not in Oakland the last of June or the first of July, 1915, but was in Santa Cruz, California, with his father, who is a prominent practicing physician there, and defendant York had been in Santa Cruz for some time previous for the purpose of going on a camping trip with his folks. This was established by the testimony of his father, of his wife, of the defendant Karr, who also had occasion to visit Santa Cruz at that time and registered with his wife at a hotel in Santa Cruz, the register of the hotel containing their original signatures being admitted in evidence and conceded by the prosecution; also by the witness Howard Emigh, who had occasion to repair the defendant York's machine which he had used in going from Oakland to Santa Cruz at that time; also by the testimony of Horace Snyder, a drug-

gist in Santa Cruz, who filled a prescription for Mrs. Karr at that time and place, Mrs. Karr having been taken sick after having reached Santa Cruz.

(Testimony of Horace Snyder, druggist in Santa Cruz, Transcript of Record, p. 227.)

(Testimony of Howard Emigh, garage man in Santa Cruz, Transcript of Record, pp. 243-244.)

(Testimony of J. M. York, physician in Santa Cruz, who prescribed for Mrs. Karr, Transcript of Record, pp. 244-245.)

(Testimony of Mrs. Irene Karr, wife of defendant Karr, Transcript of Record, pp. 246-247.)

(Testimony of Mrs. R. A. York, wife of defendant York, Transcript of Record, pp. 291-292.

(Testimony of defendant York, Transcript of Record, p. 258.)

(Testimony of defendant Karr, Transcript of Record, pp. 132-133.)

(Hotel registers in Santa Cruz, Transcript of Record, p. 133.)

(Prescription filled in Santa Cruz drug-store, Transcript of Record, pp. 227, 258.)

It would be doing violence to the testimony of reputable and disinterested witnesses to assume that it was not overwhelmingly established that defendant York was not in Oakland, California, at the time the bartender Collinbell, in his equivocating and vascillating testimony, claims he was.

The same is true with reference to the second and third overt acts charged against the defendant York—that of the *possession* and of the *passing* of the counter-

feit five dollar gold piece on one Robert Mulholland, a saloon keeper in Oakland. The overwhelming testimony shows that defendant York could not have *possessed* or *passed* this particular five dollar gold piece, because he proved a complete and perfect alibi, as previously stated.

We cannot refrain from calling this Appellate Court's attention to the unreliable character of Mulholland's testimony in seeking to fasten upon defendant York the taking by Mulholland of a counterfeit five dollar gold piece.

On cross-examination, he testified:

> "I am 23. I have been in the saloon business 3 years. I worked at the Acme saloon there for my grandfather previous to the time I acquired it. *My grandfather's name is Orlandi. He is dead. Well, I didn't pay much attention to the date of this transaction. At the time I didn't pay much attention. It occurred some time during the middle of last year. I am positive of that fact. It may have taken place on the 15th of June, as the indictment recites. I noticed that this coin was spurious at the moment I took it. Yes, I made change for this coin. I knew the coin was spurious, yet I gave them back the change. No, I was not alone in the saloon at the time. I had no assistant. There were two or three fellows in the front of the bar. Mr. Moffitt was not there. Mr. Moffitt comes in to take a drink, yes. Not very often. I might say maybe once or twice a week. Yes, he does not live very far from there. Yes, Mr. Moffitt and I are great friends. We have been for some years. He was the executor of my grandfather's estate. I have talked this matter over frequently with Mr. Moffitt. Mr. Moffitt has shown me photographs of these two men. And has asked me whether or not I could tell whether these were*

the same men. And having looked at the photographs I told him that they were. I told you I saw these gentlemen only once before seeing them in this courtroom. And that is the time they came in there. And I swear now positively that they were the gentlemen who passed the money at that time, about the 15th of June, 1915—about the 15th of June or the middle of June. I cannot possibly be mistaken. I never saw them before in my life, to my knowledge. I haven't seen them since. I identified them simply by the photographs that Mr. Moffitt, my bosom friend, exhibited to me, that is all. I did not say I passed this money on somebody else. The other fellow paid it out accidentally. The other bartender. He has not been indicted."

(Transcript of Record, pp. 47-48.)

These constitute all of the overt acts alleged against the defendant *York* as having been committed in Oakland, California.

The scene of operations next shifts, according to the indictment and evidence, to Stockton, California, and is claimed by the prosecution to involve chiefly the defendant *Karr* and transpired on July 9, 1915.

The evidence shows that the York and Karr families returned from Santa Cruz at the end of the first week in July and that on July 9, 1915, the defendant York, then being interested in a small house and lot in Tracy, California, where he had formerly resided when employed as a brakeman and conductor for the Southern Pacific Company, desired to go to Tracy to see a carpenter for the purpose of attending to some repairs required upon the house. Not wishing to go alone, he suggested to his friend Karr that he

accompany him, to which the latter consented. They went in the same "jitney" Ford machine to Tracy, but could not find the carpenter, as he was out of town. They visited several resorts and friends in Tracy. *There is no pretense whatever that while in Tracy any counterfeit five dollar gold piece was passed or attempted to be passed.* (Transcript of Record, pp. 260-263-264.)

Not being able to find the carpenter they were looking for, it was suggested that they take a short trip to Stockton where the defendant York had an acquaintance, a gentleman named Roy Gardner, a former fellow employee on the railroad with him, who, so York stated, might be useful in assisting him in getting further subscriptions for the "Orchard and Farm," in which he and his wife subsequently won, as already stated, the fourth prize for the fourth largest number of subscriptions. (Transcript of Record, p. 258.) They accordingly repaired to Stockton, arriving there about 6 o'clock; had a modest supper; listened to services being held by the Salvation Army, and then started down one of the main streets of Stockton to look up York's friend, Roy Gardner. (Transcript of Record, pp. 260-263-264.)

The latter was employed at that time, and had been for some time previous, as a bartender in one of the saloons in Stockton. He testified that he was not working on that particular evening, on account of ill-health. (Transcript of Record, pp. 241-242.)

York could not recall in which particular saloon Gardner was employed, and there being quite a num-

ber of such resorts in Stockton, it was agreed that Karr should look on one side of the main street, and York on the other.

Karr, in his quest for Gardner, entered the saloon known as Bronx Bar and, preparatory to inquiring for the bartender Gardner, asked for a drink from the witness Eickhoff and deposited a five dollar gold piece on the counter.

The bartender Eickhoff took it up and, after examining it, stated it did not look good to him and he preferred not to take it. Karr very naturally asked him what the trouble with it was and Eickhoff, using a small scale or coin weighing machine, pronounced it as somewhat light. At any rate, a discussion arose between them as to whether the coin was genuine or counterfeit, Karr, who, as the evidence shows, was of an opiniative nature, insisting that it was good, and the bartender Eickhoff as stubbornly insisting that it was not. Their discussion and examination of the coin seems to have been participated in by bystanders, some of whom agreed with Karr and others with the bartender. At any rate, the bartender finally refused to take the five dollar coin, and Karr had his drink, paid for it with other money and left the place. *Still of the opinion that the coin was good and determined to test its genuineness, he walked right across the street to another saloon—the Rex Bar—where Newton Jones was a bartender, asked for a drink, threw down the same five dollar gold piece which had been rejected by Eickhoff, and Newton Jones took it up, considered it was all right, put it in his till and gave*

Karr the change. (Transcript of Record, pp. 135-140.)

Thereupon Karr left that saloon *satisfied that the coin was good and that Eickhoff was mistaken, in which* view he was subsequently confirmed by the police officers in Stockton who examined the same coin and released the defendants.

He then rejoined York. Meanwhile, the latter had looked in vain for his friend Gardner. He had visited a number of saloons, but did not go in, merely satisfying himself by throwing open the swinging doors and looking in at the bartenders and, not recognizing his friend among them, withdrew from the places without going through the "civility" of taking a drink. (Transcript of Record, pp. 263-264.)

York and Karr again discussed the whereabouts of Gardner and separated again for the purpose of going to other places to locate him. It is not pretended that York passed or attempted to pass *on any one* at Stockton any counterfeit five dollar gold piece, nor is it claimed that Karr passed or attempted to pass *any other gold coin.*

It developed that when Karr was having the discussion with the bartender Eickhoff, one, of the employees of the place (named Louis Stemmer), who was not then on duty, took it upon himself to become a sleuth and follow Karr, and, in his perambulations, met one of the detectives of the police force of Stockton, J. T. McKenzie, and told him of his suspicions and these two men

thereafter watched the movements of both York and Karr. After following them for awhile (Transcript of Record, pp. 21-25), Karr was first arrested and taken to the police headquarters on suspicion and was there searched and closely interrogated. No counterfeit coin was found on him and he did not hesitate to give his correct name and to tell of his connections in Oakland and elsewhere. Meanwhile, the police officers sent for the coin which Karr had given to the bartender Newton Jones. This coin was examined by the police officers and detectives and was of such perfect make and so genuine in appearance, weight and sound that the police officers themselves questioned whether it was counterfeit or not (Transcript of Record, pp. 115, 143-145.)

While Karr was under arrest and being interrogated, York was also arrested on suspicion and at first kept apart from Karr. He was searched and no counterfeit money was found on him and after he was thoroughly examined by the police officers, both he and Karr were released (Transcript of Record, pp. 265-266). It was suggested by the police that they might return in the morning and take the five dollar gold piece, which had been given by Karr to Newton Jones, to some bank and have it tested to determine whether it was genuine or not. The defendants left and, seeing no occasion to remain in Stockton all night, especially after their unpleasant experience, went back to their machine and left Stockton and came back to Oakland. It should be added that the defendant Karr expected his old father (whom he had

not seen for many years) on the following morning from Tennessee, and had promised to take him to the Exposition, and was naturally anxious to get back. (Transcript of Record, pp. 133-134, *147*.)

Some time—perhaps an hour or so—after the defendants had been released by the police officers at Stockton, it suddenly occurred to one of the Stockton sleuths to search the lavatory in the rear of Lonjer's saloon. *Why search this particular saloon and not the other saloons visited by York and Karr is not explained.* This was done but nothing was found concealed there by the officers who made the search (Transcript of Record, p. 37). After they had left, it suddenly also suggested itself to the mind of a bartender in that saloon, by the name of Guy Campbell, to make a search for himself and he claims to have discovered there a small sack which was found to contain 27 counterfeit five dollar gold pieces. It was upon this discovery that was predicated the overt act by both the defendants of the possession of 27 counterfeit five dollar gold pieces (Transcript of Records, pp. 40-43). At the time of this discovery, both of the defendants were miles away from Stockton and from this particular saloon.

It is conceded by the prosecution that the defendant Karr never went in that saloon, so that a joint possession of the 27 counterfeit five dollar gold pieces could not be charged against him. It was claimed, however, that the defendant York had visited that place and although he did not take a drink there and did not pass or attempt to pass a five dollar gold piece

there, it was the far-fetched contention of the prosecution that York must have placed this small sack containing the 27 coins in the lavatory. Both defendants stoutly denied that they ever possessed 27 or any other number of counterfeit five dollar gold pieces, or that they knew anything about them or that they placed them in the lavatory in the rear of Lonjer's saloon.

Thus, we see, that the case is purely one of circumstantial evidence—circumstances, we add, of a most far-fetched, strained and chimerical nature.

The defendants, although these matters in Stockton happened on July 9, 1915, were not arrested until the following *October, 1915*. The Government officers—the secret service operatives—admitted that they could have arrested them at any time after July 9, 1915, and that they were held under close surveillance from that time until they were arrested and even afterwards; but, for the purpose of endeavoring to trap the defendants and catch them in the act of passing other counterfeit five dollar gold pieces, they permitted them to remain at large until October following, *and yet during all that time not a single violation of law could be charged against either of them* (Transcript of Record, pp. 298-300.)

Meanwhile, it is most significant in favor of the innocence of the defendants that they did not seek to escape and there is not the slightest pretense that they ever passed or attempted to pass thereafter at any place during all of their peregrinations any spurious coin of any denomination.

They returned to Oakland after leaving Stockton, California, on July 9, 1915, and remained there without the slightest attempt at concealment. Later on, in August, 1915, finding they could not obtain employment on the railroads of the Southern Pacific Company, because their standing was not good with that company, they traveled from San Francisco to one place and another in different states, seeking employment from railroads other than the Southern Pacific Company and finally obtained positions as brakemen in Ohio. When arrested, the defendant York had obtained a position in Salt Lake on a railroad running from there to Ogden and vicinage, while the defendant Karr was railroading in Ohio.

It appeared in evidence that some time during the month of September, 1915, and previous to the arrest of the defendants, Harry M. Moffitt, Chief Secret Service Operative on the Pacific Coast, had visited defendant York's brother, O. S. York, who was then on the Oakland police force, and had told him that he suspected that his brother, the defendant York, and Ed. Karr had been passing counterfeit five dollar gold pieces and asked the brother York to write to the defendant York with the end in view that the latter should confess and furnish evidence to Secret Service Agent Moffitt as to the manufacturers of these counterfeit five dollar gold pieces (Transcript of Record, pp. 83-93). The brother York complied with this request and wrote a letter, the contents of which he was permitted to testify to, the original having been destroyed (Transcript of Record, pp. 234-

236.) *This letter reached the defendant York and he immediately replied, protesting his innocence and spurning the offer made by the Secret Service Agent.* Although the trial Court permitted the prosecution, in their case in chief, repeatedly to refer to conversations relating to this letter written by the defendant York to his brother and permitted defendant York's brother to testify to the conversation he had with Secret Service Agent Moffitt and to state the contents of the letter he wrote to his brother (the defendant) on the subject, the trial Court refused to permit the defendant, as a part of these conversations, to show the reply to the letter written by him to his brother. The jury was left to infer whether the reply contained damaging admissions or not.

Furthermore, after the defendant Karr had moved away from the house rented by him from his father-in-law, H. C. Poole, at 4405 West Street, Oakland, and fully two months after the house had been vacated by Karr and the members of his family and had been rented to some itinerant Italians, only one of whom could be produced at the trial, the others having vanished, the trial court permitted the prosecution to show that in the month of September, 1915, certain Secret Service men went to this house, occupied by the mysterious foreigners just referred to who seemed to have no means of livelihood, and in the basement, which was open and accessible to anybody, found articles which they claimed indicated the former existence of a counterfeiting plant in the basement.

This proof was admitted over objection by counsel for defendants. The alleged plant in the basement was long subsequent to the consummation of the conspiracy on July 9, 1915, if any conspiracy ever existed at all. Even so, there was no charge of conspiracy *to manufacture.* A mere view of the premises —of the basement—would have convinced any jury or person with eyesight that that modest and humble home was never used, *and could not be,* for any such purpose, *that it was a physical impossibility to do so.* Two separate requests were made of the trial court on the part of the defendants to view these premises but they were denied. Counsel for the defendants charged that the Secret Service Agents, in their anxiety to convict these defendants, on whose trail they had been for three full months without arresting them, hoping then to catch them in some flagrant violation of the law, *in which they did not succeed,* had deliberately planted on these premises various articles acquired from other counterfeiting raids so as to strengthen their case.

It should be further stated that the evidence of the Secret Service Operatives showed that the counterfeit five dollar gold pieces were splendid imitations, consisting to a large extent of genuine gold and material, and would deceive anyone, and that large numbers of these had been in circulation for a long time and that they had not been able to apprehend anyone until the arrest of these defendants (Transcript of Record, pp. 58, 59, 78, 80, 115).

Secret Service Agent Moffitt admitted that:

> "It is a fact that I have been requested by my department to make a *superhuman* effort, almost, to locate the manufacturer of these clever coins." (Transcript of Record, p. 298.)

The prosecuting attorneys seem to have become imbued with the same desire, and, to their *"superhuman"* effort to obtain a conviction, the grave irregularities and acts of misconduct on their part and on the part of the jury may be attributed.

We have simply stated the substance of the testimony but an examination of the record will bear us out as to its substantial correctness.

ARGUMENT.

Trial Court Committed Grave Error in Practically Compelling Defendant York to Take Stand.

The first assignment of error urged is assignment number XXXIII (Transcript of Record, p. 385), as follows:

> "The Court erred in stating in the presence of the jury as follows:
> "'THE COURT: We are running up against that letter again.
> "'MR. WOODWORTH: I know we are.
> "'THE COURT: *My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote;* it may be self-serving.'"

This statement of the trial Judge constitutes reversible error. If anything is well settled in our criminal law, it is that a trial judge should not make the slightest allusion to a defendant testifying in his own behalf. This important and substantial right of the defendant is guaranteed by the Constitution of the United States and expressly reaffirmed in an Act of Congress.

Article V of the Amendments to the Constitution of the United States expressly provides that:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

The Act of Congress of March 15, 1878 (20 Stat. at L. 30, Chap. 37), provides:

> "That in the trial of all indictments, information, complaints, and other proceedings against

persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Boyd v. *United States,* 116 U. S. 616.

It is elementary and fundamental law of the land that a person accused of crime is presumed to be innocent.

Coffin v. *United States,* 156 U. S. 432;
Kirby v. *United States,* 174 U. S. 47.

The burden of proof is always upon the prosecution. This burden of proof never shifts in a criminal case. The issue is always single, and it relates, not to the defendant's *innocence,* but to his guilt.

Coffin v. *United States,* 156 U. S. 432;
McKnight v. *United States,* 115 Fed. Rep. 972;
Balliet v. *United States,* 129 Fed. Rep. 689;
People v. *McWhortar,* 93 Mich. 641;
Baker v. *State,* 80 Wis. 421.

The circumstances under which the trial Judge made the above damaging statement against the defendant York were as follows:

In putting in their case in chief, the prosecution was permitted to introduce portions of certain conversations had between the Secret Service Agents and the defendants York and Karr relating to a letter practically asking for a confession which the defend-

ant York's brother (O. S. York) was induced to write to the defendant York by and at the request of Chief Secret Service Agent Moffitt. The prosecution having been permitted, in its case in chief, and in the direct examination of its witnesses, as part of certain conversations, to show the existence of the letter sent by the defendant York to his brother O. S. York in reply to the latter's letter to him at the instigation of Secret Service Agent Moffitt, counsel for the defendants quite naturally endeavored to introduce in evidence the reply sent by the defendant York to his brother, so as to remove from the minds of the jurors any impression the testimony and attitude of the prosecution might have created that any inculpatory or incriminatory admissions had been made by defendant York in this written reply. Counsel for the defendants repeatedly offered the reply of defendant York whenever the opportunity presented itself. It was during the examination of O. S. York, the defendant's brother, who was called as a witness on his behalf, that counsel for the defendants again offered the reply letter in evidence. He did so after the trial Court had permitted the witness O. S. York to testify that the letter written by him to the defendant York was written at the request of Secret Service Agent Moffitt, and even went so far as to allow him to state the contents of the letter he sent to defendant York, "the letter itself apparently having been destroyed" (Transcript of Record, p. 235).

The trial Court having permitted the witness O. S. York (defendant's brother) to testify to the contents

of the letter which he had sent to his brother at the request of Secret Service Agent Moffitt, counsel for defendants brought out the fact from the witness that he had received a reply from his brother, defendant York, and thereupon the record shows the following proceedings took place:

"Q. Did you receive any return from it? A. I did.

"Q. From whom?

"THE COURT: We are running up against that letter again.

"MR. WOODWORTH: I know we are.

"THE COURT: *My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.*

"MR. WOODWORTH: *We will put Mr. York on the stand in order to get the record straight.*

"Q. Did you receive an answer to this letter?

"MR. PRESTON: He has already answered that. His answer is yes.

"MR. WOODWORTH: I now show you a letter addressed to O. S. York, 5333 James Avenue, Oakland—this is the envelope, and I also exhibit you the letter. A. This is the envelope.

"MR. PRESTON: The envelope containing the reply to your letter to which we objected a moment ago.

"THE COURT: It may be identified.

"MR. PRESTON: It is already identified.

"MR. WOODWORTH: I offer it for identification.

"Q. Is this the letter? Just look at the inside. A. Yes, that is it.

"Q That is the envelope? A. Yes.

(The letter is marked "Defendant's Exhibit 1 for identification.)

"MR. PRESTON: Q. Was it October or September that you wrote the letter? A. I had writ-

ten the letter about two days after the interview with Mr. Moffitt.

"Q. What month was it? A. September, about the 6th.

"MR. WOODWORTH: You said in your original testimony October. Was that an error? A. It was about two days after—a day after or the following day, possibly.

"MR. WOODWORTH: The letter having been marked for identification, we offer it in evidence.

"MR. PRESTON: To which we object on the ground it is a self-serving declaration by the defendant in his own interest, and not admissible.

"THE COURT: *The objection is sustained.*

"MR. WOODWORTH: *Exception.*"

(Transcript of Record, pp. 236-237.)

We submit that the remarks and ruling of the trial Court constitute substantial and reversible error. *The defendant York was practically driven upon the stand,* as was appositely stated by Circuit Judge, now Mr. Justice, Day, writing the opinion of the Circuit Court of Appeals for the Sixth Circuit, in the case of *McKnight* v. *United States,* 115 Fed. 972, *982-983.* As was said by counsel for defendant York, when the trial Judge made the above damaging remarks, for the purpose of softening their damaging effect: "We will put Mr. York on the stand in order to get the record straight" (Transcript of Record, p. 236). What else could any attorney defending his client's liberty do or say under the circumstances? To have remained silent and permitted the remarks of the trial Court to pass by unnoticed would have been suicidal. To keep the defendant York off the witness stand, after the trial Court's remarks, would have been equally disastrous.

Counsel for defendant York, acting on the spur of the moment, did the only thing he could, to assuage the pernicious effect of the trial Court's remarks.

As was well said in *McKnight* v. *United States, supra,* of a substantially similar situation:

> *"Nor does it make any difference that the defendant afterwards testified. As has been said in some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.*
>
> *"We are of the opinion that what was said by the trial judge in response to the objection of counsel as to the right of the defendant to testify was not cured by any subsequent statement to the jury upon that subject."*

In that case, it appeared that the court said:

> "The Court: That is a question of proof, entirely. Counsel cannot testify for the defendant. Col. Breckenridge: No one can make answer for the defendant but the defendant himself. The Court: *He can testify in rebuttal to this proposition.* Col. Breckenridge: He can do more than that, and we object to the statement as to his right to testify. The Court: *I did not mean he could testify in person,* but he can introduce testimony in rebuttal of the proposition. (*And thereupon the jury were told by the court to disregard the statement first made.*)"

The Circuit Court of Appeals said, of the language used by the trial judge in that case:

> "The Act of Congress of March 16, 1878, provides:

" 'That in the trial of all indictments, infromation, complaints and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts, territorial courts and courts-martial, and courts of inquiry, in any state or territory, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him.'

"The Act was under consideration in the case of *Wilson* v. *U. S.,* 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. In that case the comprehensive opinion of Mr. Justice Field leaves little to be added in a discussion of the provisions and scope of this act. The act was passed in order to give the defendant the privilege denied him at the common law of testifying in his own behalf. It recognized that, while such a statute might be available in the vindication of the innocent, it does not permit enforced testimony from one on trial for an offense. It is distinctly provided that a failure to testify should not create any presumption against the defendant. In the case of *Wilson* v. *U. S., supra,* Mr. Justice Field said:

" 'To prevent such presumption being created, comment—especially hostile comment—upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.'

"In many of the States it is especially provided that no mention shall be made of the failure of the accused to testify. This provision is not in the Federal statutes, but, as the Supreme Court has construed it, it is only available to the defendant *if all reference thereto is withheld.* The reference to the right of the defendant to testify where he does not see fit to avail himself of the privilege puts him in a position where the jury will draw inferences against him from his silence, and the

statute *which was intended as a shield for protection will be turned into a weapon of attack in establishing his guilt.* There are two lines of decisions in the State courts arising upon facts disclosing a reference to this right of the defendant to testify by the court or prosecuting attorney. One line of cases holds that, when any reference has been made in the presence of the jury to the fact that the accused may justify, the error is *irretrievable, and no subsequent instruction can dispel the effect of the allusion.* In the very instruction not to draw inferences from the silence of the accused, the fact is brought to the minds of the jury that he may, if he will, testify in his own behalf. Another line of cases holds that when the jury are told, in clear and emphatic terms, that no inference can be drawn against the accused because of his failure to testify in his own behalf, this dispells the effect of the illusion, and the error is cured. In the Wilson case, *supra,* while the question was not directly before the court as to whether such an instruction would cure the error, Mr. Justice Field said:

"'It (the Court) should have said that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.'

"If this will prevent a reversal, where unfortunately reference is made to the right of the defendant to testify in his own behalf, we do not think the record discloses in this case such correction of the impression as must have been left upon the jury by the statement of the judge that the defendant might testify in rebuttal. The jury was not told specifically what the statement first made was, and, if the jury understood the court to refer to the right of the defendant to testify, they were not told, as Mr. Justice Field says is the duty of the court under such circumstances, in clear and emphatic terms, that no importance what-

ever could be attached to the failure of the defendant to testify. *Nor does it make any difference that the defendant afterwards testified. As has been said in some authorities, after allusion has once been made to the right of the defendant to testify, the accused is virtually driven upon the stand, or remains off at the peril of having inferences drawn against him from his silence, when the law gives him the right to speak.*

"WE ARE OF THE OPINION THAT WHAT WAS SAID BY THE TRIAL JUDGE IN RESPONSE TO THE OBJECTION OF COUNSEL AS TO THE RIGHT OF THE DEFENDANT TO TESTIFY WAS NOT CURED BY ANY SUBSEQUENT STATEMENT TO THE JURY UPON THAT SUBJECT."

When an error is shown in a criminal case, it will be *presumed to have been hurtful to the party against whom it has been committed* until it appears to have been rendered innocuous.

Miller v. *Ter. of Okla.,* 149 Fed. 330;
Pettine v. *Ter. of New Mexico,* 201 Fed. 492.

As was well said in the latter case, by the Circuit Court of Appeals for the Eighth Circuit:

"The legal presumption is that error produces prejudice, and it is only when the fact so clearly appears to be beyond doubt that an error challenged did not prejudice, and *could not have prejudiced,* the complaining party, that the rule that error without prejudice is no ground for reversal is applicable."

Citing:

Deery v. *Cray,* 5 Wall. 735, 807, 808, 18 L. Ed. 653;

Peck v. *Heurick,* 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302;
Smith v. *Shoemaker,* 17 Wall. 630, 639, 21 L. Ed. 717;
Moores v. *Bank,* 104 U. S. 625, 630, 26 L. Ed. 870;
Gilmer v. *Higley,* 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62;
Railroad Co. v. *O'Brien,* 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299;
Mexia v. *Oliver,* 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602;
Railroad Co. v. *O'Reilly,* 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006;
Railroad Co. v. *McClury,* 8. C. C. A. 322, 325, 326, 59 Fed. 860, 863;
Association v. *Shryock,* 20 C. C. A. 260, 114 Fed. 458;
Armour & Co. v. *Russell,* 75 C. C. A. 416, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602;
People v. *Becker,* 104 N. E. Rep. 396.

When error is apparent in the record, it is presumptively injurious to the party against whom it has been committed, unless it appears *beyond doubt* that it did not and could not prejudice his rights.

Sprinkle v. *U. S.,* 150 Fed. 56, *59,* s. c. 205 U. S. 542, 51 L. Ed. 922;

"In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception." (Citing: *Wiborg* v. *United States,* 163 U. S. 632, 659, 41 L. Ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197.)

Crawford v. *United States,* 212 U. S. 183, 194, 53 L. Ed. 465, 470.

"It is the rule of law of this jurisdiction, often repeated, that, when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, *'unless it appears beyond doubt that the error did not and could not prejudice the rights of the party.' Vicksburg R. R. Co.* v. *O'Brien,* 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 29; *National Biscuit Company* v. *Nolan,* 138 Fed. 9, 70 C. C. A. 436; *State* v. *Russell,* 90 Iowa, 569, 58 N. W. 915, 28 L. R. A 195; *People* v. *N. Y. C. Railway,* 29 N. Y. 430; *State* v. *Cooper,* 45 Mo. 64.

"Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this, where the defendant received the severe punishment of one year and six months in the penitentiary in addition to the fine, it is the province of the Appellate Court to correct it. (Citing: *Wiborg* v. *United States,* 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. ed. 289; *Clyatt* v. *United States,* 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726.)"

Williams v. *U. S.,* 158 Fed. 30, *36.*

II.

Trial Court erred in refusing to admit the letter written by defendant York in reply to the letter received by him from his brother, written by the brother to him at the instigation of Secret Service Agent Moffitt, especially where the Court had permitted the contents of the letter written by the defendant's brother to be introduced in evidence, and had also permitted the Government witnesses, on the prosecution's case in chief, to testify to portions of conversations involving the letter written by defendant York's brother at the instigation of Secret Service Agent Moffitt.

The refusal of the trial Court to permit defendant York to introduce in evidence his reply letter (see Defendants' Exhibit 1 for identification, Transcript of Records, p. 406; see Appendix for complete copy of exhibit), is covered by assignment of error number XXXI, which is as follows:

> "The Court erred in refusing to admit in evidence, during the examination of the defendant Karr, the letter written and sent by the defendant Rollie A. York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.' "

The following assignments of error also relate to substantially the same ruling:

(Assignment of error No. XXXIII):

"The Court erred in stating in the presence of the jury as follows:

> " 'THE COURT: We are running up against that letter again.
>
> " 'MR. WOODWORTH: I know we are.

"'THE COURT: My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.'" (Transcript of Record, p. 407.)

(Assignment of error No. XXXIV):

"The Court erred in refusing to admit in evidence, during the examination of the witness O. S. York, the letter written and sent by the defendant Rollie A. York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.'" (Transcript of Record, p. 407.)

(Assignment of error No. XXXVII):

"The Court erred in refusing to admit in evidence, during the examination of the defendant York, the letter written and sent by the defendant York to his brother O. S. York, which said letter was marked 'Defendant's Exhibit 1 for identification.'" (Transcript of Record, p. 408.)

The reasons given by the trial Court were two-fold: (1) "That the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote"; and (2) "It may be self-serving." (Transcript of Record, p. 407.)

As to the first reason for its ruling, we have already argued, and again submit, that the trial Court erred and violated one of the most substantial and fundamental rights of a defendant.

As to the second ground, while it may be conceded that self-serving statements are not in general admissi-

ble, still they are admissible when the *prosecution produces the conversation in which they are contained.*

The rule is well settled that, "when statements concerning admissions are received against defendant, *he may prove his self-serving statements in connection therewith,* by reason of the rule admitting the *whole conversation.*"

12 Cyc. 427;
Burns v. *State,* 49 Ala. 370;
People v. *Estrado,* 49 Cal. 171;
People v. *Farrell,* 31 Cal. 576;
Walker v. *State,* 28 Ga. 254;
Morrow v. *State,* 48 Ind. 432;
McCulloch v. *State,* 48 Ind. 109;
State v. *Travis,* 39 La. Ann. 356, 1 So. 817;
State v. *Napier,* 65 Mo. 462;
State v. *Branstetter,* 65 Mo. 149;
State v. *Patterson,* 63 N. C. 520;
Shackelford v. *State,* 43 Tex. 138;
Lancaster v. *State,* (Cr. App. 1895) 31 S. W. 515;
Rogers v. *State,* 26 Tex. App. 404, 9 S. W. 762;
Bonnard v. *State,* 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431;
Shrivers v. *State,* 7 Tex. App. 450;
State v. *Mahon,* 32 Vt. 241;
Sager v. *State,* 11 Tex. App. 110.

Secondly: The reply letter of the defendant York should have been admitted under the rule that where the evidence shows that a letter of accusation is sent to a defendant and received by him and answered or acted upon by him, he is entitled to show his answer or declaration even though it be self-serving.

People v. *Colburn,* 105 Cal. 648, 651;
Crawford v. *U. S.,* 212 U. S. 183, 199.

Thirdly: The reply letter should have been admitted for the purpose of impeaching the testimony of the prosecution's witnesses Moffitt and Foster, who were permitted to give their recollections of what the defendant York told them he had stated in answering his letter to his brother.

As was said by the Supreme Court of the State of California in *People* v. *Estrado,* 49 Cal. 171, *173*:

> "It was not error to permit *both statements* to go to the jury, that by *comparison of the one with the other it might be ascertained how far the allegations of Cotta were admitted by Estrado to be true.* The statement of Cotta, however, so far as it was contradicted by, or was irreconcilable with that of Estrado, was not evidence against him, and if Estrado's statement in respect to the actual conflict was correct, he was innocent of any crime. It cannot be assumed that the statement of Cotta, *where denied by the defendant,* had any appreciable weight with the jury."

On any one, or more, or all, of the grounds above stated, the reply letter of defendant York should have been admitted.

The prosecution *produced the conversation* in which the Government witnesses were permitted to testify to that *portion of the conversation* which related to the *sending of a letter to defendant York by his brother at the request and instigation of Secret Service Agent Moffitt and to its subsequent destruction by the defendant York.*

Thomas B. Foster, a Secret Service Agent, was asked by the prosecution on direct examination what

the defendant York said when arrested and to state the conversation on that subject:

> (MR. PRESTON): "Q. Did Mr. York, at the time you made the arrest, say anything to you about—ask you anything about what you arrested him for? State the conversation on that subject, if any." (Transcript of Record, p. 56.)

The witness thereupon proceeded to detail a portion of the conversation, and, in doing so, stated:

> "I asked Mr. York what he had done with the letter that had been written him by his brother with reference to the cases, and he said he *had destroyed it.*
>
> "Q. Where did he say he was at the time he received the letter from his brother? A. He was in Columbus, Ohio, and *he destroyed it* either there or after he left Columbus.
>
> "Q. Did he tell you what the subject matter of that letter was, or any part of it? A. No, he did not tell me what it was.
>
> "Q. Has he a brother? A. I am informed that he has.
>
> "Q. What are his initials? A. O. S.
>
> "Q. Where does he live? A. He lives in Oakland.
>
> "Q. A police officer? A. Yes." (Italics ours.)
>
> (Transcript of Record, p. 58.)

Therefore, the conversation with reference to the letter in question was brought out by the prosecution on their case-in-chief and upon the direct examination of their own witness.

On cross-examination, the witness Foster was per-

mitted to give his version of the response the defendant York had written to his brother, as follows:

"Q. Now, you have stated that Mr. York told you that he had received a letter from his brother? A. Yes. * * *

"Q. Did you ever receive a reply to that letter—I have made this statement rather inaccurately—did Mr. York tell you that he had ever written a response to that letter? A. My recollection is that he did. * * *

"Q. Did Mr. York tell you what answer he had made to the letter of his brother?

"MR. PRESTON: To that we object on the ground it is not cross-examination.

"MR. WOODWORTH: Yes; you asked him about this letter, Mr. Preston.

"MR. PRESTON: I asked him about *destroying a letter.*

"MR. WOODWORTH: I am talking about *the same letter.*

"A. I think if my recollection serves me correctly, *Mr. York said that he had nothing to say regarding the counterfeiting matter other than what the secret service already knew.*

"*Q. That is the only answer he made to you?*

"*A. That is my recollection of it; that is the purport of it, anyhow.*

"*Q. That was with reference to the contents of that letter?*

"*A. Yes.*

"*Q. Of the letter which he wrote to his brother in answer to the one his brother sent?*

"*A. Yes.*

"MR. PRESTON: *Q. Do I understand you to say that Mr. York told you that the letter contained nothing more than the secret service already knew?*

"*A. Yes.*

"*Q. What was there about the letter—did Mr. Moffitt write him a letter?*

"A. Mr. Moffitt wrote—he did not write a letter.

"Q. What did you mean a while ago by saying Mr. Moffitt wrote a letter?

"A. No. Mr. O. S. York wrote a letter, as I understand it, after Mr. Moffitt had seen him.

"MR. WOODWORTH: In other words, Mr. O. S. York, a brother of the defendant, wrote a letter to the brother at the instance of Mr. Moffitt; is that not the fact?

"A. I don't know whether that is the fact or not. I was not there, Mr. Woodworth.

"MR. WOODWORTH: Very well.

"MR. PRESTON: Mr. York's brother wrote that letter, Mr. Moffitt did not write it?

"A. That is my information. This is all hearsay, as far as that is concerned.

"MR. WOODWORTH: We will put Mr. Moffitt on the stand. At this time I will ask these gentlemen to produce all of these letters which they received from Mr. Karr or Mr. York.

"MR. PRESTON: As far as I am concerned, I have no objection to that."

(Transcript of Record, pp. 61-62.)

When Chief Secret Service Agent Moffitt was placed on the stand by the prosecution he admitted that the letter from the defendant York's brother to the defendant York had been written at his instance and that he had the answer of the defendant in his possession, which he produced in court, but the court declined to admit the letter upon the grounds and for the reasons above stated.

The record shows that it was the prosecution that *again brought out the subject of the letter in question during their direct examination of Chief Secret Service Agent Moffitt.*

(MR. PRESTON): "Q. Did you say anything to Mr. Karr about the receipt of a letter? A. I did.

"Q. What was that? A. I asked him if Mr. York had received a letter from his brother and he said he had. I said, 'Did you see the letter' and he said 'Yes.' I asked him what the contents were and he said it was relating to a converation that I had with his brother in Oakland about October 4, or at least September 4.

"Q. Did he say anything about whether or not this Stockton case had been taken up by the authorities here? A. Yes.

"Q. What did he say in that connection?

"A. Well, he said York had written his brother a letter and in reply—

"MR. WOODWORTH: Q. What is that?

"A. He said that York had written his brother a letter in reply to the one he had received, a registered letter, I believe."

(Transcript of Record, p. 78.)

On cross-examination, he testified:

"Q. Now, you have spoken of a conversation you had with Mr. Karr with reference to a letter which had been received by Mr. York. I will ask you, did you ever see that letter received from Mr. York's brother? A. Which Mr. York have you got reference to? Q. I have reference to the brother of the defendant? A. Never saw it, no.

"Q. You never saw the letter? A. I never saw it.

"Q. You have not seen the letter to this date?

"A. I have never seen that letter, no.

"Q. Do you know where that letter is? A. I don't know. I have seen the letter written by the defendant to his brother, but not the letter written by the defendant's brother to the defendant.

"Q. All right. Then you have never seen the

letter written by Mr. York's brother, the defendant's brother, to Mr. York? A. Never.

"Q. Did you ever have a conversation with Mr. York, the defendant, with reference to that letter? A. I did.

"Q. What was that conversation? A. Well, he simply said that his brother had written him telling him I had been to see him, and I asked him where the letter was and he said that he had not it.

"Q. Did he say what he had done with the letter?

"A. I don't remember. Some one of the two said that the letter was torn up.

"Q. Now, did you ever see the letter which Mr. York's brother wrote at your instance? A. Not at my instance, no.

"MR. PRESTON: To which we object upon the ground it is assuming a fact not in evidence.

"MR. WOODWORTH: We will show that.

"Q. Did you have some interview with Mr. York's brother with reference to the defendant? A. I did.

"Q. When was that? A. Do you want me to relate the whole affair?

"MR. PRESTON: Q. If you are going to relate any, relate it all.

"A. I spoke to Mr. Preston about this matter, and I told him that I understood that Mr. York had a brother in the police department in Oakland.

"MR. WOODWORTH: Of course that is not proper.

"MR. PRESTON: Q. Confine yourself to what transpired between yourself and Mr. York's brother? A. Well, I went to see Mr. York, I think it was the 4th of September, and I told him about the Stockton incident, and that I believed that his brother knew more about these coins than he said that he knew; I said that we were endeavoring to clear the matter up and we would

like to get at the bottom of it, and I asked him if he would communicate with his brother and ask his brother if he would not give me some information that would lead to the clearing up of this matter.

"Q. By clearing up the matter what did you mean?

"A. The circulating of these counterfeit five dollar coins, and also the Stockton incident.

"Q. You also had reference to the manufacture of these coins?

"A. I certainly did.

"Q. Now what else did you state? A. I told Mr. York that I could make him no promises, and everything I said would not be considered as a promise; if he wanted to do anything I would take him to the United States Attorney and have a talk with the United States Attorney. So he said—the man didn't even know his brother—he said 'I will write him either today or tomorrow.' That was Saturday. He said 'no later than tomorrow.' He said 'Just as soon as I get a reply from him I will let you know.' I never heard from him.

"Q. You never did hear from him? A. No.

"Q. Didn't you at that time say to Mr. York's brother, that you were sure that the defendants had not made these coins because they did not have the mechanical ability or training for that purpose—did you ever make that statement?

"A. I did not say those words.

"Q. What words did you use? A. I said, according to Mr. Foster—I was going on Mr. Foster's theory—that is, from reading his report—Mr. Foster had reported these men had been engaged in the railroad business and did not think that they were skilful enough to make these coins. That was the theory that was going on, but I believed that some other man had made the coins and that they were simply the tools of the maker and were passing it.

"Q. Did you not also say to Mr. York's brother and authorize him to state in this letter—ask him to take his brother into his confidence—did you not say that, or words to that effect? A. I told him to communicate with his brother; I did not say anything about his confidence. I presumed that he would do that anyhow."

(Transcript of Record, pp. 82-85.)

Further cross-examination was indulged in and the reply letter written by defendant York to his brother, in answer to the accusatory letter, was offered in evidence, but the Court, after reading the reply letter, refused to permit it to be admitted. (Transcript of Record, p. 88.)

The reply letter was thereafter offered several times in evidence, with the same result. The envelope and letter were marked: "Deft. Exhibit No. "I" (for Ident.)" and the original is now on file in this Appellate Court with all of the other original exhibits, it having been stipulated: "That all Exhibits introduced upon the trial of the above entitled cause and now in the custody of the Clerk of the Court shall be deemed to be included as a part of the foregoing Bill of Exceptions with the same effect in all respects as if incorporated in said Bill of Exceptions." (Transcript of Record, p. 356.)

For the convenience of this Court, we have inserted a copy of the reply letter in the Appendix to this Opening Brief.

Furthermore, Chief Secret Service Agent Moffitt was, like the preceding witness Secret Service Agent Foster, permitted to give his version or recollection of

what defendant York told him he had stated in the reply letter, as follows:

> *"A. I think he said that his brother wrote or at least Mr. York wrote his brother that he had nothing to say regarding—*
> *"Q. —that he had nothing to say?*
> *"A. —regarding the counterfeiting. That is my recollection of it."* (Transcript of Record, p. 89.)

This witness makes the further astonishing statements:

> "Q. Didn't you talk about the motive he had —the reason? A. I didn't want to know anything about his motive.
> "Q. You did not. All you desired to know was if he had passed it? A. Sure.
> "Q. And the motive with which a man passes coin makes no difference to you? A. I don't know anything about the motive.
> "Q. Don't you know it is the principal thing in this case, the motive? A. I don't know anything about it." (Transcript of Record, p. 91.)

Therefore, when the case for the prosecution had closed, the record shows the prosecution had produced the conversations which contained references to the accusatory letter and to the reply letter from the defendant York; that they were permitted to show that a letter of accusation had been sent by the defendant York's brother to the defendant York at the instance of Secret Service Agent Moffitt; that the defendant York had received the accusatory letter; that said letter had been destroyed by him shortly after receiving it; that, during the conversation Secret Service

Agent Foster had with York upon the latter's arrest, one of the first and important questions asked of defendant York was as to what he had done with the letter written by his brother to him.

Furthermore, both Secret Service Agents Moffitt and Foster were permitted to give their recollections —their versions—of what defendant York had told them he had written in the letter to his brother, *which way anything but favorable to the defendant,* Secret Service Agent Foster testifying, as to his version, as follows:

> *"Mr. York said he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew."* (Transcript of Record, p. 62.)

Secret Service Agent Moffitt's version was substantially the same. (Transcript of Record, p. 89.)

Under the well settled doctrine, constituting an exception to the general rule, that statements and declarations of the accused in his own favor are inadmissible, which exception is, that when the self-serving statements are made evidence by the prosecution in producing the conversations in which they are contained, then the defendant is entitled to the admission of such self-serving statements, the defendant York, in his defense, as well as his co-defendant Karr, should have been permitted to introduce the response which defendant York made to his brother in answer to the letter written him by his brother at the instigation of Chief Secret Service Agent Moffitt. One portion of the conversation relating to the letter having gone in,

the defendants were entitled to the whole conversation relating to both letters—both the accusatory letter and the exculpatory letter.

Especially so, when the court, *sua sponte* and of its own volition, when the defendant's brother, O. S. York, was examined as a witness on behalf of the defendants, allowed him to testify as to the contents of the letter of accusation:

> "THE COURT (Intg.): I was about to state that you could show by him what the letter was. That is the only material matter, the letter itself apparently having been destroyed." (Transcript of Record, p. 235.)

Thereupon the witness O. S. York was permitted to state the contents of the letter of accusation. But when the defendants offered to introduce the reply—the exculpatory letter—offered to show that the defendant York had immediately acted upon said letter of accusation and answered it, offered to show that the letter which he wrote was not as testified to by the witnesses Foster and Moffitt, offered to show that the contents of the letter itself would negative any idea or impression that the defendant York had any sinister design in destroying the letter sent to him (the fact of destruction having been brought out by the prosecution on direct examination of its witnesses and during its case in chief), the Court denied him that right, stating:

> "My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving."

During the examination of the defendant Karr another attempt was made to introduce the reply letter written by defendant York, and the following proceedings took place:

"Mr. Moffitt asked me if Mr. York ever received the letter. I think it was on the second meeting that he asked me. At the end of this conversation he put me in the jail and the next day he came again to talk to me. That would be the 8th of October, I think. I was arrested then. I told him that Mr. York had received that letter, and he wanted to know if this R. A. York answered it, and I said he had. He said where from, and I said from London, Ontario. He said he certainly did not. Mr. Moffitt said he said he did not. I saw the letter Mr. O. S. York wrote to his brother, concerning Mr. Moffitt's proposition. I saw the answer that Mr. York wrote in London, because he handed it over to me and I read it, the same letter.

"MR. WOODWORTH: Now, if your Honor please, I do not desire to—

"THE COURT: It is hardly worth while, but you may make the offer again.

"MR. WOODWORTH: I wish to call your Honor's attention to an authority, if you would care to hear it; if not, I will let the matter go.

"THE COURT: It is the same letter?

"MR. WOODWORTH: It is the same letter; and while the general rule is as your Honor said, after working until twelve o'clock last night I discovered an exception, and the exception applies to this case.

"THE COURT: What is this exception?

"MR. WOODWORTH: The exception is, when a letter is addressed by a third party to one of the parties in interest, as it was in this case, calling for an answer, and that that answer is given, that

then it is competent as an exception to this general rule to admit that letter. We make the offer.

"THE COURT: The offer is denied.

"MR. WOODWORTH: Exception.

"(Witness continuing): I saw the letter that was sent, anyway. Do you want the conversation with Mr. Moffitt—do you want me to go right ahead with it? *This is the one about the letter. This is the second conversation. Mr. Moffitt insinuated to me that Mr. York did not write any such letter, and I told him that he certainly did write the letter, because I saw it. He said, 'There was no letter received at my office before I left.' 'Well,' I said, 'then the letter is in your place, unless O. S. York has it, because,' I said, 'That fellow is a truthful, honest fellow, and if he told you he would, he would have done it.' He said he did not receive it, and he insinuated—He told me that we were running away, or tried to get away after we got that letter, and I told him that we had laid off, that he could go and check it up by the railroad company, before this letter had ever come, and he could go to the post office and find out when that letter arrived in Columbus, to see if it was not the fact that we had laid off before we know anything about this letter."* (Transcript of Record, pp. 163-165.)

Therefore, we find that not only are the Secret Service Agents permitted, on their direct examinations and during the presentation of the case in chief on behalf of the prosecution, to testify to the existence of the accusatory letter—to conversations involving that letter—and to its destruction by the defendant York, evidently to impress the jury that this act of destruction was a circumstance indicative of a guilty conscience, and not only are the Secret Service Agents

permitted to give their own versions of what the defendant York had told them he had written to his brother in answering the accusatory letter, *which was anything but favorable to the defendants,* but we find that the Secret Service Agents threw out the insinuation that the defendants, on the receipt of the accusatory letter, planned to run away and become fugitives from justice.

Yet, in the face of all this, the Court declined to admit the answer of defendant York to the accusatory letter, which would have dispelled any impression permitted to creep into the minds of the jury that the defendant York, when accused of the offense by his brother, did not promptly and vigorously deny his guilt and protest his innocence and conclusively show, by the contents of the letter itself, that he had no guilty or sinister purpose in destroying the letter from his brother and certainly no intention to run away and become a fugitive from justice.

The insinuation was constantly thrown out by the prosecution during the trial of the case, that, when the defendants left Oakland, California, to go to other States in search of employment, they were in effect endeavoring to run away and that their search for employment was but a mere ruse on their part. If only to repel that unjust insinuation, the reply of defendant York to the accusatory letter should have been admitted.

(See cross-examination of defendant York, Transcript of Record, pp. 269-271.)

When the defendant York testified, the following proceedings took place:

> "I received a letter from my brother with reference to this matter. I answered that letter.
>
> "MR. WOODWORTH: I make the same offer now and take an exception.
>
> "THE COURT: The objection will be sustained.
>
> "MR. WOODWORTH: Exception.
>
> "(Witness continuing): Then after that I was brought here, after three weeks in Salt Lake.
>
> "THE COURT: You are speaking of the letter that he sent to his brother, not the one he received?
>
> "MR. WOODWORTH: Q. The one you received has been destroyed, has it not? A. I destroyed that.
>
> "MR. WOODWORTH: I have reference to a letter that he returned in reply to the letter which he received from his brother." (Transcript of Record, pp. 268-269.)

The general rule on the subject of self-serving declarations is well stated in 12 Cyc. pp. 426-434, as follows:

> "The statements and declarations of the accused in his own favor, unless they are a part of the *res gestae*, or *unless they are made evidence by the prosecution in producing the conversation in which they are contained,* are not competent in his favor on the trial."
>
> *People* v. *Rodley,* 131 Cal. 240;
> *People* v. *Prather,* 120 Cal. 660;
> *U. S.* v. *Craig,* 26 Fed. Cas. 14883;
> *U. S.* v. *Imsand,* 26 Fed. Cas. 15439;
> *U. S.* v. *Milburn,* 26 Fed. Cas. 15764.
>
> "When statements concerning admissions are received against defendant, *he may prove self-serv-*

ing statements in connection therewith, by reason of the rule admitting the whole conversation."

12 Cyc. p. 434;
People v. *Estrado,* 49 Cal. 171;
People v. *Farrell,* 31 Cal. 576.

"Letters Addressed to Accused: Letters written by the person injured or by third persons, addressed to the accused and received by him, *but never answered or acted on by him,* are not admissible against him unless they are part of the *res gestae.* Nor is his failure to answer them an admission of the truth of the statements contained in them. In this respect they differ from oral accusations, because otherwise the accused would be at the mercy of any letter writer whose name or address he did not know."

12 Cyc. 434;
People v. *Colburn,* 105 Cal. 648, 38 Pac. 1105;
People v. *Fitzgerald,* 156 N. Y. 253, 50 N. E. 846;
Willett v. *People,* 27 Hun. (N. Y.) 469;
People v. *Luke,* 9 N. Y. St. 638;
People v. *Green,* 1 Park, Cr. (N. Y.) 11;
Packer v. *United States,* 106 Fed. 906, 46 C. C. A. 35.

If defendant has acted upon the information contained in the letter, or if he has answered it, so much of the letter as prompted his action or received his answer is competent.

People v. *Colburn,* 105 Cal. 648, 38 Pac. 1105;
State v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449;
12 Cyc. 434.

In *People* v. *Colburn,* 105 Cal. 648, *651*, it was well said:

"The possession of unanswered letters is not such evidence of acquiescence in their contents as

to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it. (Rapalje on Criminal Law, sec. 283; Wharton on Criminal Evidence, sec. 682; *People* v. *Green,* 1 Park, Cr. Rep. 11; *Commonwealth* v. *Edgerly,* 10 Allen, 184; *Smiths* v. *Shoemaker,* 17 Wall. 630.)

"There are exceptions to the rule, as, for instance, where it is shown that the defendant has acted upon the information contained in the letter or where he has answered it, in which case so much of the letter as is explanatory of his answer is admissible, or where the party receiving the letter has by his acts or conduct invited the sending of it to him."

In *Crawford* v. *United States,* 212 U. S. 183, 53 L. Ed. 465, it was held by the Supreme Court of the United States (quoting from the syllabus):

"A letter written by counsel for the accused, with the latter's consent, and by his direction, in reply to a letter charging him with having abstracted certain correspondence from the files of a corporation, should be admitted in evidence in a criminal case to explain the letter of accusation, already admitted in evidence without objection, for the purpose of showing a suppression or spoliation of evidence."

In that case, it appeared that the prosecution had been permitted to introduce a letter written by a witness for the prosecution (one Aspinwall) to defendant as relevant as tending to prove that the defendant was charged by that witness with abstracting the letter from the files. The answer written by the defendant to this accusatory letter was offered by him "when the

case was with him * * * which, on objection, was ruled out." (212 U. S. 183, *199*, 53 L. Ed. 465, *472*.)

The Supreme Court said:

> "It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. *The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received.* * * * *If the letter were admitted, then the answer to it should also have been admitted.* The court seemed to agree that if the answer had been made by the defendant personally, instead of by his counsel, it might have been admissible, but that, as defendant did not himself write the answer, it could not be admitted. The court stated, when the offer was first made by defendant's counsel to put the answer to the letter in evidence, that it was not proper to offer any of his evidence at that time, while the case was with the government, but the answer was subsequently offered in evidence by defendant's counsel, when the case was with him, and, under objection, was again rejected. *So the defendant had the accusing letter put in evidence against him and was not permitted to have his answer, through his counsel, admitted in reply.* * * *
>
> "When the letter was first offered and received in evidence on the part of the government the defendant had not been placed on the witness stand, and after he had been on the stand this evidence was retained, while the defendant *was not permitted to show what his written answer to*

the charge of spoliation was, because the answer was written by his counsel (although by his direction and under his authority), and not by himself personally. An explanation of the reason for his taking the letters might be quite material to enable the jury to come to a decision as to the *moral make-up of defendant,* but he was not allowed to fully give it. The court of appeals also held that the answer to that letter, concededly written by defendant's counsel, was plainly inadmissible, but that, even if its exclusion had been error, it was cured by the fact that the defendant, when on the stand, testified *to the same explanation of his action, i. e.,* that he understood that Aspinwall had consented that he take such of the files as he desired.

"We do not think that the letter written by counsel for the defendant was inadmissible. The defendant had in substance testified that it was written by his counsel, with his consent and by his direction. In other words, that counsel was acting simply as the agent and under the direction of his principal, the defendant in the case. It was not necessary that such letter should be written by the defendant personally, in his own handwriting. *The importance of the matter lies in the fact that defendant, as soon as the accusation was made, had, through his counsel, acting under his direction, explained the charge made of secretly taking evidence which was in the hands of a third party, and which he feared might be used against him. The defendant did on the trial testify to the same explanation as contained in the letter of his counsel, i. e., that Aspinwall in substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter, written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it* * * *

> *"There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment.* (Citing *Deery* v. *Cray,* 5 Wall. 795, 807, 18 L. Ed. 653, 657; *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. Ed. 717.)"

We submit that the rule, laid down by the Supreme Court of the United States in the case of *Crawford* v. *U. S., supra,* is controlling of the situation in the case at bar.

The trial court permitted the Secret Service Agents, during the presentation of the case of the prosecution in chief, and on direct examination, to prove a portion of a conversation relating to the letter of accusation written to defendant York by his brother at the instigation of Secret Service Agent Moffitt; it permitted them to testify that this letter had been destroyed; it permitted the testimony on the part of Secret Service Agents Moffitt and Foster as to the answer that defendant York had made in his written reply to his brother, which was anything but favorable to the innocence of the defendant; afterwards, when the case was with the defendants, the trial court, of its own volition, permitted defendant York's brother to testify as to the contents of the letter he had written to defendant York; and yet, having permitted all these matters to go before the jury, refused to admit in evidence the reply of defendant York to the accusatory

letter written at the instigation of the Secret Service Agent. In this, we respectfully submit, with the greatest deference to the learning and ability of the trial Judge, that he was in error.

As was well said in the case of *Crawford* v. *United States, supra*:

> *"The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received."*

Furthermore, contents of the accusatory letter having been admitted and it having been shown that it was written at the instigation of the Secret Service Agent, and also that the accusatory letter had been destroyed by the defendant, it was highly important that his reply should be shown to the jury so that they could see for themselves that the destruction of the letter was innocent on his part and was not done with the idea of concealing anything. For all that we know, the prosecution having proved the destruction of the accusatory letter, the jury may have thought that the defendant York destroyed it from a consciousness of guilt, whereas his reply made immediately and without hesitation would have shown his absolute denials and protestations of innocence and that he had no criminal motive in destroying the accusatory letter; also, to offset any impression created in the minds of the jury that, after receipt of the letter, the defendants sought to run away.

Again, as held in the case of *Crawford* v. *U. S.*,

supra, his explanations in his reply letter, *"might be quite material to enable the jury to come to a decision as to the moral makeup of defendant, but he was not allowed to fully give it."*

Another authority, directly in point, is the case of *Sager* v. *The State,* 11 Tex. Cr. App. Rep. 110, *112-113,* where the Court of Appeals of the State of Texas said:

> "The State, on the examination of Woolsey, her own witness and the alleged owner of the stolen articles, had drawn out *part of a conversation* between witness and defendant in which witness *stated he had charged defendant with the theft.* On cross-examination with regard to this conversation, defendant asked him to state *what was the defendant's reply to the accusation of theft.* On objection by the State the court refused to permit the evidence, for the reasons that the statements so made by defendant were *not only self-serving declarations,* but, having been made long after the offense was committed, defendant could not avail himself of them as evidence in his behalf. Self-serving declarations, it is true, that is, declarations made by a defendant in his own favor, unless part of the *res gestae* or of a confession offered by the prosecution, are inadmissible as evidence for him. Whart. Crim. Ev. (8th ed.), Sec. 690; *Harmon* v. *State,* 3 Texas Ct. App. 51. But the admissibility of the evidence here proposed did not rest upon that ground. Had the defendant proposed in the first instance to introduce these declarations, the objection might have been urged with great propriety, and would doubtless have been tenable. *But here he was examining the State's witness on cross-examination with regard to his part in a conversation about which the State had examined partly her own witness. Such being the case, and the State having opened the*

> *door for its introduction by proving part of the conversation, defendant had the right to give in evidence the whole conversation upon the subject (Code Crim. Proc., Art. 751), and the court erred in refusing to permit him to do so."*

In the case of *State* v. *Patterson,* 63 N. C. 520, *521,* the rule applicable to a situation, such as exists in the case at bar, was thus stated by the Supreme Court of North Carolina:

> "The general rule is, that a person's own declarations are not admissible for him, except under a few peculiar circumstances. But it would be unfair to receive what others said to the accused, and refuse to hear what he said in reply. This opinion is not based upon the idea that the declarations of the defendant were a part of the *res gestae,* as was contended for upon the trial below, but it rests upon the familiar principle, that when a party calls for a statement made at a given time and place, the opposite party is entitled to all that was said in the same conversation. This rule applies both to civil and criminal cases."

In *State* v. *Mahon,* 32 Vt. 241, *244,* the rule is thus stated:

> "The defendant had the right to have all that he said upon that subject at that time received and weighed by the jury as evidence, *that which made the connection to be innocent and honest, as well as that which admitted any connection. * * * It is a rule laid down by all writers on the law of evidence, and is one of the best settled and most familiar rules of evidence."*

In the case of *Mattox* v. *United States,* 146 U. S. 140, *153,* 36 L. Ed. 917, *922,* it was held that where

one part of a dying conversation had been permitted, the entire conversation, *even though self-serving in behalf of the defendant,* should be admitted. The Supreme Court said:

> "He was then interrogated as to who did the shooting, and he replied that he did not know. *All this was admitted without objection.* Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the party who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde (the defendant) who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sustained. In this, *as the case stood,* there was error. *So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner and bring out, if he could, what more, if anything, he said in that connection. * * * We regard the error thus committed as justifying the awarding of a new trial."*

In *Shackelford* v. *The State,* 43 Tex. 138, *141,* it was aptly said:

> "It is often difficult to determine as to the admissibility or exclusion of the statements or explanations offered by an accused person. *It is safer, if there be a question of doubt or uncertainty, to solve the doubt by ruling in favor of the accused."*

The same rule obtains in the Federal courts, where, the Circuit Court of Appeals, for the Second Circuit, in *Parker* v. *U. S.,* 106 Fed. 906, 46 L. R. A. 35, in ruling that a letter addressed to a defendant, *and not*

answered by him, should not have been admitted in evidence, stated the exception as follows:

> "It could not be applicable to any case where the letter only tends to support a charge of guilt, and *where it has been followed by no action, and no response on the part of the person receiving the letter.* The same principle has been repeatedly applied in civil actions. *Fairlie* v. *Denton,* 3 Car. & P. 103; *Gaskill* v. *Skene,* 14 Q. B. 664; *Learned* v. *Tillotson,* 97 N. Y. 1; *Bank* v. *Delafield,* 126 N. Y. 418, 27 N. E. 797; *Gray* v. *Ice Cream Co.,* 162 N. Y. 397, 56 N. E. 903, 49 L. R. A. 580."

In *People* v. *Amaya,* 134 Cal. 331, *536*, it was said of an oral accusation against the defendant:

> "It is no doubt true, that, to render evidence of this character admissible, the occasion and the circumstances must have been such as to afford the accused person *an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply.* (Greenleaf on Evidence, par. 197.) *But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest.* (*People* v. *McCrea,* 32 Cal. 98; *People* v. *Estrado,* 49 Cal. 171; *People* v. *Ah Yute,* 53 Cal. 613.)"

In *People* v. *Ah Yute,* 53 Cal. 613, *614*, it was held that statements made to the prisoner in respect to his connection with the alleged offense are admissible, to show his conduct when the statements were made, but not as evidence of the truth of the statements, and the Supreme Court of this State said:

> "This question was fully considered in *People* v. *McCrea,* 32 Cal. 98. The testimony objected

to in that case was of the same character as that stated above, and it was held that it was admissible —that such statements were admissible, 'not as of themselves evidence of the truth of the facts stated, *but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement.' That is, in our opinion, the proper solution of the question.*" (See, also, *People* v. *Estrado,* 49 Cal. 172.)

In *People* v. *McCrea,* 32 Cal. 98, *100,* Justice Sawyer, afterwards United States Circuit Judge, in holding that statements of accusations, whether oral or written, acted upon by the defendant, should be admitted, both the accusation and the reply or conduct of the defendant, said:

"The rule recognized by these authorities is clearly broad enough to cover the testimony in question. But these statements are admitted, not as of themselves evidence of the truth of the facts stated, *but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement. His own action under the circumstances in which he is placed, is the matter to be considered and weighed by the jury.* The degree of credit due to such evidence of implied admissions is to be estimated by the jury under the circumstances of each case. But jurors should be cautioned not to allow their attention to be diverted from the conduct of the prisoner—the real matter to be considered—to the statements of the third party, as containing the evidence of the facts sought to be established. To do so, would be to receive and give effect to statements which, except for the purpose of showing the circumstance under which the prisoner is called upon to act or

> speak, would be wholly inadmissible. *The prisoner, at best, is taken at a disadvantage, and is bound to reply or not reply, at his peril, to the inquiries or statements of any officious intermeddler who may be able to obtain access to him. There was no error in admitting this testimony; but the jury are to judge all the circumstances, entitled to any, and how much weight, as indicative of an admission of guilt."*

In the case of *People* v. *Ah Yute,* 54 Cal. 89, *90,* decided on a rehearing, it was held that statements of third persons, made in presence of the defendant, are admissible against him only to the extent they are admitted by him to be correct, either by his words or conduct; and the conduct of the defendant is the gist of the inquiry, and the only matter to be considered by the jury. Such statements are, therefore, inadmissible unless accompanied with proof of defendant's statements or conduct in response thereto. Justice Ross, now a member of the Circuit Court of Appeals for this circuit, said:

> "In all of those cases the prosecution was allowed to prove statements of third parties made in the presence of the defendant, *together with defendant's statements and conduct in response thereto.* The conduct of the defendant is the gist of the inquiry, and is the only matter to be considered and weighed by the jury. The statements of third persons are admitted only as preliminary to the inquiry, and for the purpose of showing his conduct. Thus, in *People* v. *Estrado, supra,* it is said: 'The statement of Cotta was not offered to prove of itself the circumstances narrated by him. It was evidence against the defendant *only to the extent it was admitted by the defendant to be correct,* his acquiescence being

indicated by his express assent, by his silence, or by acts or by conduct on his part which could be fairly construed as an assent.' (See, also, Roscoe's Criminal Ev., p. 52; 1 Greenleaf's Ev., Secs. 197, 215; Joy on Confession, 77.)

"In the case at bar, the prosecution, as we have seen, was permitted to introduce statements of third persons, made in defendant's presence, to the effect that he was the guilty party, and there to stop—*without any proof whatever of the only matter that could properly be considered by the jury, namely, the conduct of defendant when so accused.* Such testimony was purely hearsay, and should have been stricken out on defendant's motion."

In the case of *People* v. *Estrado,* 49 Cal. 171, *173,* Justice McKinstry, in holding that the statement of a third party in the defendant's presence, as well as defendant's statements and conduct at the time were admissible. The learned Justice said:

"Immediately after the close of the narration by Cotta, a statement was made by Estrado, which, while denying many of the details of the accounts given by the former, agreed with that account as to some of the facts. *It was not error to permit both statements to go to the jury, that by comparison of the one with the other it might be ascertained how far the allegations of Cotta were admitted by Estrado to be true.* The statement of Cotta, however, so far as it was contradicted by, or was irreconcilable with that of Estrado's statement in respect to the actual conflict was correct, he was innocent of any crime. It cannot be assumed that the statement of Cotta, where denied by the defendant, had any appreciable weight with the jury."

The same rule obtains in civil cases.

In *Smith* v. *Shoemaker,* 17 Wall. 630, 21 L. Ed. 717, the Supreme Court of the United States, through Mr. Justice Miller, said:

> "The admission of the letter was objected to and an exception taken on the ground, among others, that plaintiff could not introduce his own declaration or that of those under whom he claimed, to show that the ancestor of defendants had entered under the person making the declaration. Other and more specific grounds of objection were taken, but it is not necessary to mention them here, for it is certainly a sound principle of evidence, that such a declaration as this, whether oral or in writing, is inadmissible, unless some exception to the general rule be shown."
>
> "Another objection is, that there is nothing in the record to show that the letter was delivered to Hamilton J. Smith, or was ever in his possession or acted upon by him. It is not shown how the plaintiff came into possession of it, or from what source it was produced by his counsel at the time of the trial. It would violate nothing found in the record to suppose that the letter was written and delivered to the plaintiff by its supposed author on the same day it was read in evidence. When a party seeks to justify in a court of review the admission of such *ex parte* declarations of himself or his vendor, against the objection of the other side, he must show by the record some circumstance which would obviate the manifest soundness of the objection."

Entire conversation is competent, *though self-serving declarations are included therein,* where one party introduces evidence as to such conversation. *Olson* v. *Brundage,* 139 Ill. App. 559.

Letter written by party, in his favor, is admissible in evidence if necessary or helpful in explaining an-

swer introduced by other party. *Schwarschild & Sulzberger Co.* v. *Pfaelzer,* 133 Ill. App. 346.

In the case of *Carber* v. *United States,* 164 U. S. 694, 41 L. Ed. 602, it was held that where a conversation is permitted to be proved, the other party may prove his version of it. Mr. Justice Brown said:

> "If it were competent for one party to prove this conversation, *it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that defendant was not prejudiced by the conversation as actually proved, but where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary or contradict it.*"

Where one part of a conversation is put in evidence, the other party is entitled to all the conversation.

1 Bishop Crim. Practice, Sec. 1241.

In Underhill's Criminal Evidence, Sec. 119a, an exception to hearsay rule as to self-serving declarations is made where prosecution offers in evidence declarations which tend to incriminate accused, then defendant may introduce whole conversation *even though it be wholly in his favor.*

Rogers v. *State,* 26 Tex. App. 404;
Fertig v. *State,* 75 N. W. 960;
Lowry v. *State,* 53 Tex. Crim. App. 562.

In the case of *Stephenson* v. *United States,* 86 Fed. 106, *108, 110-111,* it appeared that:

"In connection with this evidence the plaintiff

in error offered the evidence of one Alexander Smith as to the conversation between the witness and himself at the time just preceding the said Schriverer's approach to the party, to the effect that the witness Smith had opened a conversation with the plaintiff in error, saying to him, 'John, you have killed the man,' and plaintiff in error replied 'Who is it?' and the witness said 'Joe Gaines,' whereupon the plaintiff in error replied, 'I wish I had been that other son-of-a-bitch, Bluff Davidson;' immediately upon which the government's witness, Schrivener, came up, and continued the conversation as testified to by him. To the introduction of this evidence by Alexander Smith objection was made, and the Court excluded the same upon the ground that it was self-serving, and not a part of the *res gestae,* nor in explanation of the other declarations in evidence. To this ruling of the court exceptions were duly taken."

The Circuit Court of Appeals held this to be error and said:

"The conversations and declarations of the accused after his arrest formed no part of the *res gestae,* and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them, and when the United States proved the conversations and declarations *the accused was entitled to have the full conversation or conversations given in evidence. This we understand to be elementary.* The case clearly shows that what Scrivener heard defendant say after the homicide was intimately and directly connected with the conversation between the accused and witness Smith, and, as the part Scrivener heard was offered in evidence, *the whole, on the request of the accused, should have been admitted. Where one part of a conversation is introduced, the other party is entitled to all*

that relates to the same subject, and all that may be necessary to fully understand the portion given.

1 Bish. Cr. Proc., Sec. 1241; *Carver* v. *U. S.*, 164 U. S. 694, 696, 17 Sup. Ct. 640."

The question, which led to the particular letter which the Court refused to admit in evidence, was asked by the prosecution during the examination of their own witnesses, Foster and Moffitt, in presenting their case in chief.

The cross-examination of the witness Foster, a witness called on behalf of the Government, referred to this letter and the witness Foster was permitted, without the slightest objection from the United States attorney, to state the contents of that letter, it then appearing that the Government officers had possession and custody of the letter. He was permitted to say as follows:

"Q. Did Mr. York tell you what answer he had made to the letter of his brother? A. I think, if my recollection serves me correctly, Mr. York said that he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew.

"Q. And that is the only answer he made to you? A. That is my recollection of it. That is the purport of it, anyhow.

"Q. That was with reference to the contents of that letter? A. Yes.

"Q. Of the letter which he wrote to his brother in answer to the one sent by his brother? A. Yes."

Secret Service Agent Moffitt was permitted to swear that he had seen the letter, that it was handed to him

by his assistant, Costanzo, and that it was taken on a search warrant from the defendant York brother's custody and that he then had possession of that letter and would only produce it if required by the District Attorney. The letter was then produced. The Court read the letter and refused to admit it.

Thereafter O. S. York, the defendant's brother, was permitted, at the Court's special instance, to state the contents of the letter of accusation which had been written to the defendant York.

The reply of the defendant should have been admitted for the reason that the Court permitted testimony showing that a letter of accusation had been sent to the defendant York, the Court permitted the contents of the letter of accusation to be testified to, the Court permitted evidence that the defendant York had actually received the letter and had destroyed it, and that he had replied to it.

The Court having permitted one portion of the conversation to go in, the defendant was entitled to the whole of the conversation.

Secondly, the Court having permitted evidence to show that a letter of accusation had been sent at the instance of the Government officers, the defendant was entitled to show that he acted upon the same and that he replied to the same and that he repudiated the accusation and protested his innocence.

Thirdly, the Government having been permitted to show statements concerning admissions against a defendant, he may prove self-serving statements in

connection therewith, by reason of the rule admitting the whole conversation. The testimony of Foster and Moffitt as to what the reply of York contained *was anything but favorable to the defendant and made it appear that he had nothing to say, that he did not deny, that he acquiesced in what the secret service men already knew.* As testified to by Foster it was tantamount to an admission of guilt. The defendant was, therefore, entitled to prove his self-serving declarations.

Fourthly, the letter itself was admissible to contradict the testimony of Foster and Moffitt as to the contents of the letter and for the purpose of dispelling any idea that York had nothing to say regarding the counterfeit matter, other than what the secret service already knew, or that he ever intended to run away.

To leave the case before the jury without the reply of the defendant York before them was highly prejudicial to the defendants; to leave the case before the jury after proof of the letter of accusation at the instance of the Government officers, after proof of the contents of the letter of accusation, after proof of its receipt by the defendant York, simply with the version of the contents of the reply as given by the witnesses Foster and Moffitt wherein they state that the purport of the answer made by defendant York to the letter of accusation was: *"Mr. York said that he had nothing to say regarding the counterfeiting matter, other than what the secret service already knew,"* was to leave the case in a most prejudicial condition before the jury and leave the defendants at the mercy of such

impression as the jury might see fit to give to the version of the letter given by the witnesses Foster and Moffitt.

Furthermore, this substantial error was aggravated by the Court when it, in sustaining the objection made by the prosecution to the introduction of this letter said: *"My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving."* In other words, the jury must have construed the language of the Court as meaning that unless the defendant York took the stand he was a guilty man. This was fundamental error, as the silence of the defendant cannot prejudice him. He is not required to be a witness and any such remark of the Court was uncalled for and constitutes substantial error. The courts and prosecuting officers are not permitted, by virtue of a special statute, to make the slightest reference to the fact that a defendant may or may not, or should or should not, become a witness in his own behalf.

We respectfully submit that further argument, on errors so palpable and prejudicial to defendants on trial for their liberty, is unnecessary.

III.

The trial Court erred in permitting the jurors to experiment with an article not in evidence.

This is covered by the following assignments of error:

(XL): "The Court erred in permitting a 'square block of iron' to be shown, handled by and experimented by the jurors, over the objections of the attorneys for the defendants that said 'square block of iron' had not been introduced in evidence."

(XLI): "The attorneys for the Government erred in presenting and showing to the jurors and in handing to them and in permitting the jurors to experiment with a 'square block of iron,' when said 'square block of iron' had not been introduced in evidence."

(XLII): "The Court erred in overruling the objection of the attorneys for the defendants to the question propounded on cross-examination of the witness Frank T. Green, called on behalf of the defendants, which question was as follows: 'MR. PRESTON: Q. I will show it ('square block of iron') to you and ask you what it is?'"

(XLIII): "The jurors, or some of them, erred to the substantial prejudice of the defendants in being permitted by the Court and the attorneys for the Government to see and to be shown and to handle and to experiment with a 'square block of iron', which had not been introduced in evidence, over the protests and objections of the attorneys for the defendants."

(XLIV): "The Court erred in overruling the objections of the attorneys for the defendants that any questions be asked of the witness Frank T. Green concerning or with reference to a 'square block of iron', which was not admitted in evi-

dence, or in permitting, over the objections of the attorneys for the defendants, any of the jurors to see or be shown or to handle or to experiment with said 'square block of iron.'"

(XLV): "The Court erred in permitting any experiments whatever by any of the jurors with a 'square block of iron', and a five dollar gold piece and a five cent nickel piece, when said 'square block of iron' had not been admitted in evidence, all to the substantial prejudice of the defendants." (Transcript of Record, pp. 408-410.)

The record discloses the following situation with respect to this grave and highly prejudicial error:

The prosecution, during its case in chief, had been permitted to show, through Secret Service Agent Isidore Costanzo, that a certain "square block of iron," *never introduced in evidence,* was found in the basement of the house where defendant Karr had formerly resided with his wife and child. This "square block of iron" was not discovered in the basement until some time toward the end of September, 1915, long after the Karr family had moved away and long after the consummation and end of the alleged conspiracy—on July 9, 1915. Furthermore, the evidence indisputably shows that the Karr family had moved from this house during the month of July, 1915; that it was vacant for two months; that the basement was always open and accessible to anybody and everybody who chose to go in; that it was never locked; that after the Karr family had vacated the premises and it had been vacant for a couple of months, certain itinerant foreigners, probably Italians, rented the place for a month or so; that they had no visible means of

support; that a man and his wife and child who lived there for several weeks could not be found at the time of the trial and had completely vanished; that one Paul Montfort, who resided with the man and woman who disappeared, did appear and testify; that he denied that he had been secretly employed by the Secret Service Agents to rent the place; that the pretense of the Secret Service Agents, that they had discovered plaster of paris in the basement, was exploded, when counsel for defendants produced the witness Frank T. Green, an expert chemist, whose testimony showed that what the prosecution claimed to be plaster of paris, testified to be such by Secret Service Agent Costanzo (Transcript of Record, pp. 106-108), was not such and in reality was nothing more than air-slaked lime, a material which could *not* be used for moulds, to which plaster of paris alone is peculiarly adapted. (Transcript of Record, pp. 285-286.)

Previous to the examination of this witness, the Secret Service Agents had committed the grave act of misconduct of exposing to the view of the jury, in such close proximity to the jury box that they could not help but noticing it, a "square block of iron". This made such an impression upon the jurors that, during the examination of Mrs. Irene Karr, defendant Karr's wife, one of the jurors, while questioning Mrs. Karr, called for this "square block of iron." *During all this time, it must be remembered, the "square block of iron" had not been introduced in evidence.* At that particular moment, when first called for by the juror, the "square block of iron" did not happen to be in

court. It was subsequently brought into court and the following proceedings took place:

"A JUROR: Is not plaster of paris used in very many instances for making moulds for metals and things of that kind? A. I am not familiar, I will state, with the method of casting medals or coins. Q. You are familiar with casting metals? A. No.

"Another Juror: May I see that square block of iron?

"The Court: The square block of iron?

"Mr. Woodworth: No square block of iron has been introduced in evidence.

"Mr. Preston: No. A witness has to be put on the stand before that can be used as evidence, unless you want to ask him a question about it.

"The Juror: I want to ask him a question about it.

"Mr. Woodworth: Unless the block is introduced in evidence, it cannot be used.

"Mr. Preston: What is the nature of your question? State your question.

"The Juror: There is some impression on here that would look as though it were the face of a coin, and also on the opposite side. I want to ascertain the size of the coin that would fit in there; and if it were possible by placing a coin in there that you could cover it with plaster of paris and ascertain whether it could become a mould for a coin.

"THE WITNESS: That I may answer is a technical question calling for a knowledge of the casting of metals in proper moulds, and I am not competent to answer that.

"Mr. Woodworth: I desire to reserve the objection, your Honor. Mr. Preston has not yet introduced this and it has not yet been connected with the defendant, and it certainly is highly improper to permit a question of that sort to be addressed to the witness or to allow the juror to see such a thing, unless it is in evidence.

"MR. PRESTON: I cross-examined the witness Mr. Poole and asked him if he had seen this stuff.

"MR. WOODWORTH: You had never shown him that?

"MR. PRESTON: I did show him that.

"MR. WOODWORTH: What did he say about it?

"Mr. Preston: He said he had not seen it there. Before the case closes, when the defendants close their proof, we will show it was there at the place when he closed it up. At that time it would be more proper to have the matter in evidence.

"Mr. Woodworth: I understand that you have closed your case in chief, and I don't know that you have any right hereafter to introduce further evidence.

"Mr. Preston: We will see; that is for the Court.

"The Juror: The only point is, that this hole on this side is the size, I think, of a five dollar piece and the other isde is the size of a nickel. I may be wrong, and I may be correct (after experimenting). This is the size of a five dollar piece there and this appears to be the size of another coin; I don't know what.

"THE JUROR: The point I had, your Honor, was that it might possibly be used as a basis for making moulds and not as a mould itself. A. May I answer?

"MR. PRESTON: If you can. A. I made an examination for the attorney. Shall I repeat that—am I permitted?

"MR. WOODWORTH: Q. Did you examine this also? A. No, I saw that.

"MR. PRESTON: Q. I will show it to you and ask you what it is.

"Mr. Woodworth: Of course, I would like to know this—I have never heard of this before in this case.

"Mr. Preston: It was identified or described.

"Mr. Woodworth: It has never been introduced in evidence.

"Mr. Preston: We will introduce it.

"Mr. Woodworth: I object to the witness testifying to something that has not been introduced in evidence.

"Mr. Preston: It is in evidence as much as the box is. I would like to have him say what it is anyway.

"The Court: The objection will be overruled.

"Mr. Woodworth: Exception."

(Witness continuing): I think a chemist could answer what it is upon a chemical examination. No, I could not tell what it is without a chemical examination. (Transcript of Record, pp. 286-289.)

Outside of what the record shows, these experiments by the jurors with the "square block of iron" *were conceded to have taken place by the prosecution.* This was made manifest upon presentation of the motion for a new trial, when the following proceedings took place, the jurors all being present in open court:

(Mr. Woodworth, addressing the Court): "I desire to call to the witness stand and examine the jurors for the purpose of establishing the misconduct and irregularities complained of, unless the District Attorney will admit the facts. We now offer to prove by each, every and all of the jurors who tried this case that the square block of iron, which was produced in court during the trial, by the Secret Service officers and the prosecution, and which I now hold in my hand and which is 'Exhibit A' attached to the affidavits of the defendants on the motion for a new trial, was actually exhibited to and in the presence of the jury and to the jury by the Secret Service Agents Moffitt and Costanzo, although it had not then been

admitted in evidence; that this square block of iron, with what appeared to be the impression of a $5 piece on one side of the square block and of a five cents or nickel piece on the other side of the square block, was exhibited to the jury and was placed by the Secret Service Agents on the edge of the jury box upon the floor thereof, right in front of the first row of jurors, where it could be and was actually seen by all of said jurors seated in the first row and by some of the other jurors seated in the second row, and was permitted to remain under the gaze of said jurors at the southwestern corner or edge thereof nearest to the table where the prosecuting attorneys and Secret Service Agents sat during the trial, and said square block of iron was permitted there to remain under the gaze of the jury and particularly of juror A. D. Shepard for some considerable time and was permitted to be inspected and handled and experimented with by some of the jurors in attempting to and in actually fitting in $5 gold pieces into one of the cavities contained on one side of the square block of iron, which cavity appeared to contain the impression of a $5 piece and seemed to be of a size that would admit of the placing therein a $5 piece, and that after such personal inspection, handling and experimenting as above set forth and as shown by the record of the proceedings in this case, that said square block of iron was then withdrawn or taken away by said Secret Service Agents Moffitt and Costanzo without its having been admitted in evidence or offering the same in evidence at that time; that said square block of iron was again brought into court by the Secret Service Agents and again exposed to the view of the jurors and again permitted to be inspected, handled and experimented with and questions propounded with reference thereto by some of the jurors and some one of the prosecuting attorneys without its having been admitted in evidence or offering the

same in evidence at that time. Unless you are willing to admit these facts, Mr. Thomas, I will call each one of the jurors to prove what I now offer to show."

(MR THOMAS): "I do not think it will be necessary to call the jurors. *The record shows that was exhibited to the jury and we admit that the block of iron was in the court and was on the panel there for a while and that it was examined by one of the jurors. I don't admit he fitted it in. I admit that experiments were made with it.*" (See Transcript of Record, pp. 330-331.)

It is true that the Court below denied the motion for a new trial and, mindful of the rule that, in the Federal Courts, error cannot usually be predicated upon the denial of a motion for a new trial, we are not assigning any error on that ground.

That jurors are not permitted to experiment is well settled. Especially is this true with reference to objects or material not admitted in evidence.

Underhill on Crim. Ev. (2nd Ed.), Sec. 228, pp. 416, 418, and cases there collated;
People v. *Conkling,* 111 Cal. 616; 44 Pac. 314;
Forehand v. *State,* 51 Ark. 553, 11 S. W. 766;
State v. *Sanders,* 68 Mo. 202, 30 Am. 782;
Jimm v. *State,* 4 Humph. 289;
Stokes v. *State,* 5 Baxt. 619, 30 Am. Rep. 72;
Harris v. *State,* 24 Nev. 803, 40 N. W. 317;
People vs. *Stokes,* 103 Cal. 193, *198;*
Wharton's Crim. Ev., Vol. I (10th Ed.) 611 (Note);
Ewers Admr. v. *Nat. Imp. Co.,* 63 Fed 562;
Kruidener v. *Sheilds,* 70 Iowa 428, 30 N. W. 681.

"For the jury to perform experiments during their deliberations with the weapons alleged to

have been used in the commission of the crime is error."

Hansing v. *Territory,* 4 Okla. 443, 46 Pac. 509.

The general rule is thus stated in 12 Cyc. 678:

"Experiments by the jurors by which they ascertain facts material to the case, but not included in the evidence, constitutes misconduct on their part and will justify a reversal." (Citing cases.)

In Hayne New Trial and Appeal, Vol. 1, sec. 26, page 141 (Revised Edition), the rule is laid down that if the "misconduct" or irregularity *may* or *might have* prevented a fair trial, a new trial should be granted and the rule is further laid down that such "misconduct" or "irregularity" is presumed to have prevented a fair trial.

That eminent author refers to the leading case on the subject, of *Commonwealth* v. *Rodey,* 12 Pick. 496; also *Hare* v. *State,* 4 How. (Mass.) 107, and other leading cases, including California and Federal Courts.

See, also, Hayne New Trial and Appeal, Vol. 1, pages 309-317, 318, 324, and cases there collated.

In the case of *People* v. *Thornton,* 74 Cal. 482, *484,* it was held that a pamphlet admitted in evidence and "by consent considered read in evidence," but which was *not read in evidence,* could not be taken to the jury room and read by the jurors during their deliberations, and that to permit the jurors to take the pamphlet as a whole to the jury room and to read portions thereof other than were actually read to them during

the trial, constituted receiving evidence out of court and was misconduct and a new trial should be granted.

In Hayne New Trial and Appeal, Vol. 1, page 315, sec. 67, it was said:

> "The theory of jury trials is, that all the information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and instruct them as to the law of the case, and where the parties can counteract the effect of any particular evidence by producing such other evidence as they may have. If the jurors were permitted to investigate the case outside of the courtroom, there would be great danger of their getting a one-sided and illegal view of the case. Accordingly, the great preponderance of authority is to the effect that if such investigations have taken place a new trial must be granted, unless it is shown affirmatively that they did not affect the result. Information concerning the case may be conveyed to the jury either by oral communication or by documents relating either to the facts or to the law of the case. These modes of unlawful communication will be considered separately."
>
> "If it be *doubtful* from the record whether *injury* was done or not, the verdict *must be set aside.*"
>
> Hayne New Trial and Appeal, Vol. 1, p. 318.
>
> "Where, however, the irregularity is shown, it is *presumed* to have been injurious unless the court can see the contrary from the record."
>
> Hayne New Trial and Appeal, Vol. 1, p. 320.

In the case of *People* v. *Mahoney,* 77 Cal. 529, 530-531, it appeared that:

> "After the jury had returned to deliberate upon a verdict, they requested through the deputy sheriff that a certain coat, alleged to have been

worn by the deceased at the time of the killing, should be sent into the jury room for their inspection. The transcript certified by the judge states that the coat 'was the one which had been produced and examined in open court during the examination of the witnesses Carpenter and Lannom, and at said time exhibited to the jury. After the retirement of the jury the officer in charge of the jury informed the court that the jurors had expressed a desire to see the coat. The court informed counsel, in the presence of the defendant, that the jurors had requested that the coat be sent into the jury room for their inspection. Thereupon defendant's counsel stated that the coat *had not been formally offered in evidence.* In response to that suggestion the court said that if the coat *was not in evidence, the jurors would have to get along without the coat.* Counsel for defendant thereupon, after a moment's reflection, *consented* that the coat might be submitted to the jury.' *The consent of counsel for defendant* in the presence of the defendant, that the articles might be sent to the jury, was a *waiver of all objection,* and we see no error in the action of the court or jury."

In the case at bar, the attorney for the defendants made repeated objections to the "square block of iron" being shown to the jurors and vehemently protested and called the court's attention thereto and excepted. The experiments by the juror Shepard with the "square block of iron," in the presence of the other jurors, in open court, was a most flagrant violation of the defendant's rights to a fair and impartial trial, especially in permitting him to experiment with something "not in evidence."

Continuing the statement of the law on this subject,

Hayne, New Trial and Appeal, volume 1, page 321, section 67 (Revised Edition), states:

> "Slightly different in form, but requiring a similar application of principle, it is that kind of misconduct which originates in independent investigation. No matter at what stage of the proceedings a juror undertakes an inquiry of his own, if it appears that information of a character calculated to exert any influence upon the verdict is obtained ,a new trial will be granted, unless it is shown affirmatively that no such result followed. An illustration of the rule is to be found in the case of *People* v. *Conklin* (111 Cal. 616, 44 Pac. 314), a murder case, where members of the jury procured a rifle, presumably of a pattern identical with that used in the homicide under investigation, and carried on experiments of a somewhat exhaustive character, for the purpose of studying the effect of shots upon clothing at varying distances, and making comparison with that observed upon the garments of the deceased. A new trial was granted."
>
> "Receiving evidence out of court is specifically made a ground for new trial in criminal cases."
>
> Hayne, New Trial and Appeal, vol. 1, p. 24.

Proof that while a case was pending, and before the testimony was concluded, or the charge given, one of the jurors privately measured the distance as testified to in the case, is ground for setting aside the verdict.

Ewers, Admr., v. *Nat. Imp. Co.,* 63 Fed. 562.

In *People* v. *McCoy,* 71 Cal. 395-*397,* the Supreme Court of California said:

> "Jurors in a criminal action are sworn to render a true verdict according to the evidence.

They cannot, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impression received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial."

In *People* v. *Stokes,* 103 Cal. 193, it was held that a new trial should be granted where it appeared that after retiring to deliberate upon their verdict some of the jurors read an article in a local newspaper containing a report of the evidence in the case, *including certain evidence which the court had ruled to be inadmissible,* and it was held that it would be presumed to have influenced the jurors, and a new trial should be granted for misconduct of the jury.

The Supreme Court said:

"The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, *which included a matter of evidence the court had rejected as inadmissible,* and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room.' The law, in its wis-

dom, does not allow a juror to purge himself in that way. It was said in *Woodward* v. *Leavitt,* 107 Mass. 466, 9 Am. Rep. 49: 'But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind.' "

People v. *Mitchell,* 100 Cal. 328.

In *People* v. *Conkling,* 111 Cal. 616, *627*, it appeared that:

"When the defendant's motion for a new trial came before the court he offered the affidavits of certain parties to the effect that during the progress of the trial two of the jurors borrowed a rifle similar to that with which the deceased was killed, bought some cotton drilling, retired to the outskirts of the city, and there made experiments by firing the rifle, for the purpose of determining at what distance powder marks would be carried by the fire. The evidence upon this question disclosed by the affidavits is circumstantial, but we think amply sufficient to establish the fact that these things were done by the two jurors. Especially is this so when we pause to consider that those jurors have not denied the fact by counter-affidavits. They were evidently honest, and desirous of getting at the truth of the matter; but they were too zealous, and their misconduct in this particular demands a retrial of the case. *Jurors cannot be permitted to investigate the case out-*

side the courtroom. They must decide the guilt or the innocence of the defendant upon the evidence introduced at the trial. It is impossible for this court to say that this outside investigation did not affect the result as to the character of the verdict rendered. For, when misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears. (*People* v. *Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102.)"

In *Yates* v. *People*, 38 Ill. 527, it was said:

"In support of his motion for a new trial, the plaintiff in error filed an affidavit, in which he stated that, after the jury had retired to consider upon their verdict, and without any knowledge of himself, his counsel, or the court, a pistol was sent to them as the same pistol with which the killing had been done, *though it has not been offered in evidence and identified,* and with this pistol the jury made experiments which determined their verdict, they having been, up to this time, equally divided. The statements in this affidavit do not seem to have been controverted by the people's attorney, but we find a stipulation in the record that the pistol mentioned in the affidavit was the same pistol which had been exhibited to the jury on the trial and spoken of by the witnesses. * * *

"Because this pistol *which had not been put in evidence or identified,* was allowed to go to the jury, without the prisoner's consent, a new trial should have been granted, *and on this ground we reverse the judgment.*"

Forehand v. *State*, 51 Ark. 553, 11 S. W. 766.

"The jury's misconduct in taking the deceased's pistol and cartridges to the jury room, and there experimenting with them, apparently for the purpose of testing the truth of the defendant's statement, was prejudicial to him. It was evidence taken by the jury out of the court in the defend-

ant's absence, which is prohibited by the statute and contrary to the rules of fair and orderly proceedings. For this error the judgment must be reversed."

State v. *Saunders,* 68 Mo. 202, 30 Am. 782.

(Syll.) The counsel for the defendant in a criminal case, in the course of his argument to the jury after the close of the evidence, told them that they had a right to try for themselves whether worn out boots, like those described by the witness for the state, would make such tracks in the dust or sand as they described, and advised the jury to make the experiment. Several members of the jury actually did make the experiment out of court, without obtaining the leave of the court, and in the absence of the defendant. Held, that this was such misconduct as invalidated the verdict, and the defendant was not precluded from alleging it as ground for a new trial by the fact that it was done at the instance of his counsel. It was the duty of the court and the state's attorney to have warned the jury against making the experiment.

"Disregarding the affidavit of the juror Jessop, which was clearly inadmissible, we have still before us the fact that a portion of the jury experimented, with a view to ascertain a fact testified to at the trial, and to test the credibility of the witnesses who testified in regard to that fact. That such experiments by a portion of the jury, or by all the jury, are improper, without leave of the court, is incontrovertible. * * * The question here, however, is whether, after the jury are invited by the defendant's counsel to make certain experiments for themselves, and the jury, or a portion of them, do so, the defendant can, after the verdict is unfavorable, take advantage of this misconduct of the jury invited by himself. This looks like allowing a party to take advantage

of his own wrong, and therefore has caused some hesitation, but upon reflection, we have concluded that the court and the attorney for the state should share the responsibility of such misstatements and allowing them to go uncontradicted. The judge, who presided at a trial of a criminal, should not allow the jury to be misled as to their duties or powers. * * * If we consider the affidavit of Jessup, no presumption is necessary, but apart from that, the possibility of the experiment being so used is sufficient to establish its impropriety. Upon the whole, without special regard to the present case, we are of opinion that it would be unsafe to further relax the well-established rules governing the conduct of juries and that we must, therefore, recommend this case for another trial."

Where the question was, could the prisoner's voice have been heard on a certain occasion, the experiment of stationing a man outside the jury room who was to listen and report if he could hear the voices of the jurors through a closed door, was held ground for a new trial.

Jim v. *State,* 4 Humph. 289.
Stokes v. *State,* 5 Baxtr. 619, 30 Am. Rep. 72.

(Syll.) On a charge for murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that wherein the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused and the court instructed the jury that his refusal was not to be taken against him. The

prisoner was convicted. Held, that he was entitled to a new trial.

Harris v. *State,* 24 Neb. 803, 40 N. W. 317. (Juror improperly took law book into jury room and read from it.)

"The rule of public policy which excludes the testimony of jurors to impeach their verdict extends only to matters taking place during their retirement and it is competent to impeach the verdict as to matters occurring outside the jury room during the progress of the trial."

Rush v. *St. Paul City R. Co.,* 70 Minn. 5, 72 N. W. 733.

In some states it is said that "affidavits of jurors may be received, for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room which does not essentially inhere in the verdict itself."

Vol. 8, Encyc. of Ev., p. 979.

See *Kruidenier* v. *Shields,* 70 Iowa, 428, 30 N. W. 681 (using evidence not legally admitted. Held cause for reversal and new trial).

For the same reason, for the jury to perform experiments, in the courtroom, in the very presence of the court and prosecuting officers, with a square block of iron never introduced in evidence, is a much more flagrant error.

In the leading case of *People* v. *Stokes,* 103 Cal.

193, 196, it was said, of the misconduct of the jury, as follows:

> "The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, *they could make no showing that could relieve them of the effects of their own misconduct. A juror is not allowed to say: 'I acknowledge the grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury room.' THE LAW, IN ITS WISDOM, DOES NOT ALLOW A JUROR TO PURGE HIMSELF IN THAT WAY.* It was said in *Woodward* v. *Leavitt,* 107 Mass. 466, 9 Am. Rep. 49: 'But, where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, *THOUGH NOT TO SHOW WHETHER IT DID OR DID NOT INFLUENCE THEIR DELIBERATIONS AND DECISION.* A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, *BUT HE CANNOT BE PPERMITTED TO TESTIFY HOW FAR THAT INFLUENCE OPERATED UPON HIS MIND.'"*

In the case of *People* v. *McCoy,* 71 Cal. 395, it was said:

> "If it be *proved as a fact,* or *may be presumed as a conclusion of law,* that the verdict MAY HAVE BEEN INFLUENCED BY INFORMATION OR IMPRESSIONS RE-

CEIVED FROM SOURCES *OUTSIDE OF THE EVIDENCE IN THE CASE,* SUCH A VERDICT IS SUBJECT TO BE SET ASIDE ON A MOTION FOR NEW TRIAL."

See, also, *Carter* v. *State,* 9 Lea (Tenn.) 440.

The attempted differentiation made, upon argument of the motion for a new trial (and which we expect to be renewed here), by the United States Attorney, of all of the authorities cited by us containing instances of misconduct by jurors in making experiments outside of the courtroom or in receiving evidence outside of the courtroom of matters or things not admitted in evidence, is absurd, puerile, illogical and unsound.

What possible difference, in principle and from the standpoint of a fair and impartial trial to a defendant, it can make in the application of the law whether a juror is guilty of misconduct in receiving information or impression from sources not in evidence or making experiments with articles not introduced in evidence, *while in court and during the trial of the case,* and his receiving information or impressions from sources not in evidence or making experiments with articles *outside of the courtroom,* we fail to understand.

Indeed, we are inclined to believe that to permit a juror to so misconduct himself as to receive information or impression *while in the courtroom and during the actual trial,* or to permit him to make experiments with articles not in evidence *while in the courtroom and during the trial of the court* and *with the apparent sanction of the court and of the prosecuting offi-*

cers, constitute irregularities and acts of misconduct and substantial errors much more flagrant than where the irregularities or acts of misconduct are committed outside of the courtroom and therefore beyond the knowledge and control of the court and of the prosecuting officers.

A case very much in point is that of *Whitney* v. *Whitman,* 5 Mass. 315-316 (405-406 of old edition), where it appeared that:

> "In this action, after the parties were heard, and the judge had summed up the evidence, and given the jury the necessary direction in matters of law, when the papers were delivered to the jury, a material paper, *not read in evidence,* was delivered to them by mistake, which was not discovered until the jury had returned into court, and had delivered their verdict.
>
> "The party against whom the verdict was found now moved the court for a new trial for this cause.
>
> "On examining the paper, it appeared to the court to furnish material evidence in favor of the party prevailing; but he moved the court to examine some of the jurors, *to prove that they were not influenced by it in finding their verdict.* The other party had also summoned other jurors to prove the influence.
>
> "THE COURT REFUSED TO EXAMINE ANY OF THE JURORS, AND OBSERVED THAT THE COURT MUST BE GOVERNED BY THE TENDENCY OF THE PAPER APPARENT FROM THE FACE OF IT; THAT IT WAS NOT PRETENDED THAT THE JURY HAD NOT READ IT, AND IT WOULD BE DIFFICULT FOR JURORS, WHERE, AS IN THIS CASE, THERE WAS MUCH EVIDENCE OF

DIFFERENT KINDS, CLEARLY TO DECIDE IN WHAT MANNER THEIR MINDS WERE INFLUENCED IN FORMING THEIR VERDICT. AS IT WAS RECEIVED BY THE JURY AMONG OTHER WRITTEN EVIDENCE, AND READ BY THEM, IT MUST BE PRESUMED THAT THEY CONSIDERED IT AS EVIDENCE, AND GAVE DUE WEIGHT TO IT.

"The verdict was therefore set aside and a new trial granted."

In the case of *Hicks* v. *Drury,* 5 Pick. 297-*303*, also reported in 22 Mass, 296, *302*, it was said:

"So where a paper which is *capable of influencing* the jury on the side of the *prevailing* party, goes to the jury by accident, and is read by them, the verdict will be set aside ALTHOUGH THE JURY MAY THINK THAT THEY WERE NOT INFLUENCED BY SUCH PAPER, *FOR IT IS IMPOSSIBLE FOR THEM TO SAY WHAT EFFECT IT MAY HAVE HAD ON THEIR MINDS."*

(Citing *Benson* v. *Fish,* 6 Greenl. 141.)

The Assistant District Attorney has admitted in this case that:

"The record shows that it was exhibited to the jury and we admit that the block of iron was in the court and was on the panel there for awhile and that it was examined by one of the jurors. I don't admit he fitted it in. I admit that experiments were made with it."

It is now idle and absurd to claim that no substantial injury was done to the defendants by what

was done in court with the "square block of iron" or that the jurors *could not have been* influenced thereby.

Why was the square block of iron referred to at all during the trial, if it was so inconsequential? Why was it permitted to be brought into court and exposed for an appreciable length of time to the gaze of the jurors and placed on the panel right in front of the first row of jurors, if it was so inconsequential? Why was the witness Costanzo permitted to testify that he had found the square block of iron in the basement of the house where two months previous to the finding defendant Karr had lived, if it was so inconsequential? Why did the juror Shepard call for it during the examination of Mrs. Karr if it was so inconsequential and had not made an impression on his mind? Why was the juror Shepard afterwards again permitted to call for it, during the examination of the witness and chemist Green, and, over the protest, objections and exceptions of the attorneys for the defendants, with the sanction of the court and prosecuting officers, permitted to examine closely the square block of iron in the presence of the other jurors, although it was not then in evidence and was never thereafter admitted in evidence, and to experiment with the same and to fit in a five dollar gold piece in one of the cavities on one side of the square block and a nickel or five cent piece on the other side of the square block and to make comments with reference thereto and with reference to the purpose of his experiments (all of which is shown by the Bill of Exceptions), if it were so inconsequential and had not

made a deep and prejudicial effect upon his mind and upon the minds of the rest of the jurors?

Why were all of these things permitted to be done and said by the prosecuting officers, in their frantic desire for a conviction, if the "square block of iron" were so inconsequential?

We think we may aptly paraphrase the language used in the case of *Hicks* v. *Drury, supra,* as follows:

> "So where a square block of iron which is *capable of influencing* the jury on the side of the *prevailing party,* goes to the jury by accident" (in the case at bar by design) "and is seen and experimented upon by them, the verdict will be set aside, ALTHOUGH THE JURY MAY THINK THAT THEY WERE NOT INFLUENCED BY SUCH SQUARE BLOCK OF IRON, *FOR IT IS IMPOSSIBLE FOR THEM TO SAY WHAT EFFECT IT MAY HAVE HAD ON THEIR MINDS.*"

The record shows that the juror Shepard considered that there was "some impression on here that would look as though it were the face of a coin, and also on the opposite side. I want to ascertain the size of the coin that would fit in there, and if it were possible by placing a coin there that you could cover it with plaster of paris, and ascertain whether it could become a mould for a coin." (Transcript of Record, p. 287.)

Again the juror said in open court, after actually experimenting with a five dollar piece to see if the five dollar piece would fit in the cavity or impression which looked like a five dollar piece (all this in the

presence of the other jurors and with the apparent sanction of the court and prosecuting officers, and against the protest, objections and exceptions of the attorneys for the defendants):

> "The only point is, that THIS HOLE ON THIS SIDE IS THE SIZE I THINK OF A FIVE DOLLAR PIECE AND THE OTHER SIDE IS THE SIZE OF A NICKEL. I MAY BE WRONG AND I MAY BE CORRECT. (After further experiments): *THIS IS THE SIZE OF A FIVE DOLLAR PIECE THERE* and this appears to be the size of another coin, I don't know what." (Transcript of Record, p. 288.)

And again the juror Shepard said, addressing the court:

> "The point I had, your Honor, was that it might possibly be used as a basis for making moulds and not as a mould itself." (Transcript of Record, p. 288.)

How any one can read this record dispassionately, in view of all the evidence presented of a circumstantial nature as to the passing and attempted passing by Karr of a five dollar gold piece and of the claim by the Government that the 27 five dollar gold pieces found in the rear of Longer's saloon were at some time—when, no one knows—in the possession of York, and of the other evidence as to the finding of alleged counterfeiting material in the basement of Karr's home or residence, and then contend that the actions, experiments, statements of the juror Shepard in the presence of the other jurors in fitting in a five

dollar gold piece into the cavity on one side of this square block of iron and the jurors' exclamations and statements in that connection, did not, and *could not,* have prejudiced the defendants or caused them substantial injury, is incomprehensible.

The entire proceedings, as to the square block of iron, were irregular; they constituted inexcusable acts of misconduct on the part of the juror and of the Secret Service Agents and of the prosecuting officers and they seemed to have, judging from the record, the sanction and approval of the Court.

They resulted in substantial injury and prejudice to these defendants. *The presumption of law is that they did.* The burden of proof, to repel that presumption and satisfy this appellate court that they did not result in prejudice, is on the prosecution. The prosecution has signally failed to repel that presumption of substantial injury and prejudice growing from the irregularities and acts of misconduct disclosed by the record. If this Court entertain any doubt as to whether the irregularities, errors and acts of misconduct were harmful to the defendants, or either of them, it is in duty bound to resolve that doubt in favor of the defendants. Some of the authorities even go so far as to lay down the rule that if the Court has "the slightest doubt" as to whether harm was done to the defendants, it should grant a new trial.

Balliett v. *U. S.,* 129 Fed. 689, *696;*
Sprinkle v. *U. S.,* 150 Fed. 56, *59,* s. c. 205 U. S. 542, 51 L. Ed. 922;
Williams v. *U. S.,* 158 Fed. 30, 36;
Pettine v. *Terr. of New Mexico,* 201 Fed. 492.

It must be further remembered that the defendants were not charged with making counterfeit money or with making moulds for the purpose of making counterfeit money. They were simply charged with a conspiracy to pass counterfeit $5 gold pieces. Even the Secret Service Agents conceded that. (Transcript of Record, pp. 85, 86, 298.)

It will undoubtedly be contended by the learned United States Attorney, as it was in the Court below on the motion for a new trial, that the trial Judge cured this grievous error by giving a cautionary instruction to the jury in the following words:

> "You are not to consider any testimony or exhibits or matters or things exhibited to you during the trial unless the same were admitted in evidence by the Court, and you are not permitted to allow yourselves to be influenced by anything in this case outside of the testimony, evidence and exhibits which have been actually admitted and are in evidence. In other words, you must try this case and determine the guilt or innocence of these defendants solely and exclusively upon the testimony, evidence and exhibits introduced in this case and nothing outside of that." (Transcript of Record, pp. 312-313.)

Did such cautionary instruction cure the grave acts of misconduct and irregularities complained of and effectually sweep out of the minds of the jurors the deep, lasting and prejudicial impressions against the defendants that must have resulted from their experiments in fitting in a $5 gold piece into one of the cavities of the "square block of iron" and a nickel

piece into the other cavity of the "square block of iron," which was never admitted in evidence?

The Supreme Court of the United States in the leading case of *Waldron* v. *Waldron,* 156 U. S. 361, 39 L. Ed. 453, in considering the function of cautionary instructions, laid down the rule that even a cautionary instruction will not cure an error where the error committed was *of so serious a nature that it must have affected the minds of the jury despite the correction by the Court.* The syllabus reads as follows:

> "(7) It is the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, the cause of reversal is thereby removed, *unless the error committed was of so serious a nature that it must have affected the minds of the jury despite the correction by the court.*"

In that case, it appeared that certain improper and incompetent evidence was admitted and that, in the arguments of counsel to the jury, certain improper remarks were made. The trial court sought to cure the errors arising from the matters above mentioned in the following language:

> "The evidence also taken on the trial of that case is not competent evidence against the defendant in this case, and was also excluded. She, not being a party thereto, is not permitted to appear and cross-examine the witnesses. Nor should the jury assume or infer from anything in evidence in this case that the judgment of divorce was granted upon the ground of adultery, as that is not one of the grounds alleged in the bill of

complaint, nor upon any ground of—for any of the causes having reference to the conduct of the defendant in this case. *Such an inference has been sought to be drawn by counsel from the proceedings in that case, but it is an inference not warranted by the record in evidence and unfair towards the defendant. The jury will try this case upon the evidence produced on this trial, and not assume or infer that other evidence might have been produced here or was produced in some other case to which the defendant was not a party.*"

This cautionary instruction was practically the same as that given in the case at bar.

Mr. Chief Justice White, delivering the opinion of the Supreme Court, said, of the futility of such cautionary instruction after serious error—damage—has been done to a party:

"We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. *State* v. *May*, 15 N. C. 330; *Goodman* v. *Hill*, 125 Mass. 589; *Smith* v. *Whitman*, 6 Allen 562; *Hawes* v. *Gustin*, 2 Allen, 506; *Dillin* v. *People*, 8 Mich. 369; *Specht* v. *Howard*, 83 U. S. 16 Wall. 564 (21:348). *There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to*

have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. The rule and its exception were considered in *Hopt* v. *Utah,* 120 U. S. 430 (30:708), where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice Field: 'But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted its subsequent withdrawal from the case with its accompanying instruction cured the error. *It is true that in some instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error, but such instances are exceptional.'*

"The case here, we think, comes within the exception."

The doctrine announced by the Supreme Court of the United States in that case is directly applicable to the particular circumstances attending the experiments of the jurors with the "square block of iron" not in evidence. It must be plain that the cautionary instruction given to the jury, after the damage was done to the defendants, was of no efficacy at all.

If such be the rule in civil suits, how much stronger should be its application to prosecutions involving the liberty of the citizen.

Another authority apposite to the case at bar, upon the proposition that a subsequent instruction of the court will not always cure a serious irregularity or act of misconduct on part of the jury or of the prosecuting officers, or a substantial error taking place during the

course of the trial, is the case of *Lathan* v. *United States,* 226 Fed. 420, *425*. That was a decision of the Circuit Court of Appeals for the Fifth Circuit. It there appeared that:

> "The District Attorney, in closing the case for the Government, made the statement that, had the train not been three hours late, he would have had another witness, who would have testified that he also had been defrauded. The defendant's counsel immediately objected, and the objection was sustained by the court, and the jury *properly cautioned not to consider said statement of counsel.*
>
> "The defendants' counsel assigned these remarks as error in his 27th assignment. The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury, this cures the violation of the defendant's right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. *Yet in each of the cases expressions will be found which militate against this view in exceptional cases.*
>
> *"Every one must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel,* and ALTHOUGH THE JURY HONESTLY TRIED TO IGNORE THAT IMPRESSION IT STILL ENTERS INTO AND FORMS A PART OF THE VERDICT. *In such cases the trial court should set aside the verdict on motion for new trial.* The language of Justice Fowler, in *Tucker* v. *Henniker,* 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions:

"'Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the *slightest degree influenced the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened.*

* * * IT IS UNREASONABLE TO BELIEVE THE JURY WILL UTTERLY DISREGARD THEM. THEY MAY STRUGGLE TO DISREGARD THEM. THEY MAY THINK THEY HAVE DONE SO, AND STILL BE LED INVOLUNTARILY TO SHAPE THEIR VERDICT UNDER THEIR INFLUENCE. * * * TO AN EXTENT NOT DEFINABLE, YET TO A DANGEROUS EXTENT, THEY UNAVOIDABLY OPERATE AS EVIDENCE WHICH MUST MORE OR LESS INFLUENCE THE MINDS OF THE JURY, NOT GIVEN UNDER OR WITHOUT CROSS-EXAMINATION, AND IRRESPECTIVE OF ALL THOSE PRECAUTIONARY RULES BY WHICH COMPETENCY AND PERTINENCY ARE TESTED."

So, take it in the case at bar, it would be idle for the court to rule out incompetent, or immaterial, or irrelevant evidence, or exhibits, if the jury are allowed to consider such evidence or exhibits during the trial, although the same have never been admitted in evidence.

Com. v. *Edgerly,* 10 Allen. 184;
Stewart v. *R. R. Co.,* 11 Iowa 62.

New trials are often granted because improper evidence has been permitted to be given in the hearing

of the jury, ALTHOUGH THEY ARE *AFTERWARDS* INSTRUCTED TO DISREGARD IT.

Penfield v. *Carbenter,* 133 Johns 350;
Irvine v. *Cook,* 15 Johns 239.

As was well said by Circuit Judge, now Mr. Justice, Day, in *McKnight* v. *United States,* 115 Fed. 972, *983,* of the futility of the cautionary instruction given in that case after the damage was done to the defendant:

> "We are of the opinion that what was said by the trial Judge in response to the objection of counsel as to the right of the defendant to testify was *not cured by any subsequent statement to the jury upon that subject.*"

In the case of *Nelms* v. *State,* 13 Spedes & Marshalls, 500-*508,* the Supreme Court of the State of Mississippi said, through Mr. Chief Justice Sharkey:

> "THE PURITY OF TRIAL BY JURY MUST BE STRICTLY GUARDED. THE VERDICT WHEN RENDERED SHOULD COMMAND ENTIRE CONFIDENCE; WHATEVER MAY DETRACT FROM THAT CONFIDENCE, MUST WEAKEN THE SECURITY WHICH IS FELT BY THE COMMUNITY IN THIS MODE OF TRIAL. * * * IT IS DANGEROUS TO PERMIT A VERDICT TO STAND WHICH IS LIABLE TO SUSPICION."

As was well said by the Supreme Court of the State of California in *People* v. *Mitchell,* 100 Cal. 328:

> "It is unfortunate for the jury system, and for the cause of justice, that such episodes should oc-

> cur in the trial of causes, but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances."

As we confidently believe that a reversal must follow and a new trial be ordered, due to the serious and grave errors to which we have already called the attention of this Appellate Court, we do not elaborately argue other errors claimed by us.

The three important errors are:

First: The remarks of the trial Judge, practically compelling the defendant York to take the stand as a witness in his own behalf;

Second: The refusal of the trial court to admit the exculpatory letter of defendant York in answer to the accusatory letter sent to him by his brother at the instigation of Chief Secret Service Agent Moffitt;

Third: Permitting the jurors to experiment with an article not in evidence, especially when it appears that the defendants were not charged with a conspiracy to manufacture counterfeit money or to make moulds.

While we are satisfied to present our contentions and arguments in support of these three principal points, still we do not wish to be understood as having abandoned or waived a number of other points set out in the assignment of errors.

However, we will attempt to do no more than to state these other erroneous rulings without undertaking to elaborate upon them either by argument or by citation of authorities.

IV.

The trial Court erred in permitting evidence to go to the jury of an attempted passing of a $5 counterfeit gold coin by the defendant York in the year 1914, fully six months *previous* to the formation of the conspiracy alleged in the indictment as taking place in Oakland, California, on January 1, 1915.

This error is covered by the following assignments:

> "(III) The Court erred in overruling the objections made by the attorneys for the defendants to the introduction in evidence of the testimony of the witness David M. Boyle."
>
> "(IV) The Court erred in overruling the objections made by the attorneys for the defendants to the questions propounded to the witness David M. Boyle, on his direct examination, a witness called for the United States, which question was as follows:
>
> "'MR. PRESTON: Q. Did you, in the year 1914, have a transaction with reference to a $5 gold coin?'"
>
> "(V) The Court erred in overruling the objection made by the attorneys for the defendants to the question propounded to the witness David M. Boyle, on his direct examination, a witness called for the United States, which question was as follows:
>
> "'Q. Describe the coin transaction?'"
>
> "(VI) The Court erred in refusing to grant the motion of the attorneys for the defendants to strike out all of the testimony of the witness David M. Boyle." (Transcript of Record, pp. 377-378.)

See, also, Assignments of Error numbers VIII, IX, XXVII. (Transcript of Record, pp. 379, 383.)

The views of the prosecution, in offering to prove a transaction not included within any of the overt acts

in furtherance of the conspiracy charged in the indictment, the objections and exceptions of counsel for the defendants, and the views of the trial court will be found fully set out in the Transcript of Record, on pages 51, 52-54, 56.

At the close of the Government's case counsel for defendants renewed a motion to strike out all of the testimony relating to the Boyle transaction, which was denied and exception taken. (Transcript of Record, pp. 123-124.)

As we have stated, the Boyle incident antedated the conspiracy charged in the indictment to have been entered into on January 1, 1915, by several months. The defendants had no notice of such an episode until they were actually on trial. It was not one of the overt acts alleged against them. The rule is well settled that:

> "If, however, overt acts are specified in the indictment, the proof must be confined to the acts so specified."
> 8 Cyc. 684.

V.

The trial Court erred in permitting testimony as to the finding of certain articles in the basement at 4405 West Street, Oakland, where defendant Karr and his family had formerly lived, it appearing that he had moved from there in August, 1915, and that the conspiracy was consummated and ended on July 9, 1915, at Stockton, California, and it appearing that the premises had been vacant and accessible to anybody for two months before the alleged discovery of the articles referred to. That thereafter it was occupied by some foreigners who could not be found at the time to testify at the trial.

The objections to this testimony and to a number of articles introduced as exhibits are conserved by several assignments of error, which may be grouped together, as follows: Numbers XII, XIII, XIV, XV, XVII, XVIII, XIX, XXIII, XXIV, XLVI, XLVII, XLVIII, XLIX, L. (Transcript of Record, pp. 380, 381, 382, 388-389.)

It was contended by counsel for defendants that all of this evidence as to what transpired two or three months after the end and consummation of the conspiracy, if any ever existed, was immaterial, irrelevant and incompetent and entirely too remote, and that the articles could not be introduced, not being connected with the defendants by sufficient legal evidence. It is important to appreciate that these articles were claimed by the prosecution to have been used in counterfeiting operations and they sought to show that the basement had been used for such purpose.

It is well settled that acts or declarations of con-

spirators after the crime is committed, are inadmissible to prove a conspiracy to commit it.

People v. *Irwin,* 77 Cal. 502.

The conspiracy, if any there was, terminated with the arrest of the defendants.

State v. *Grant,* 86 Iowa, 216, 53 N. W. 120.

Furthermore, the defendants were not charged with a conspiracy to manufacture counterfeit coin but with a conspiracy to pass counterfeit $5 gold pieces.

VI.

The Court erred in admitting in evidence the 27 counterfeit $5 gold pieces, found in the rear of Longer's Saloon in Stockton, California, on July 9, 1915.

This error is covered by Assignments numbers I and II. (Transcript of Record, p. 377.)

There was absolutely no evidence that the defendant Karr, who is charged jointly with the defendant York as having committed the overt act of the guilty possession of these 27 counterfeit $5 gold pieces, ever had them in his possession or that he ever was in Longer's Saloon.

The only pretense urged against defendant York was that he entered and went to the rear of Longer's Saloon. All this was previous to their arrest in Stockton.

The 27 coins were not discovered until several hours after the defendants had left Stockton for their homes in Oakland.

There was absolutely no evidence to connect either of the defendants with these 27 counterfeit coins except the most strained inference that because defendant Karr had had some trouble with a $5 coin, which he honestly considered genuine, as did the Captain of Police and others who saw the coin at the time, and because defendant York was with him at that time, that the possession of these 27 other coins must perforce, at some time or other, be attributed to the defendants. We respectfully submit that a mere reading of the testimony on this point will show the unreason-

ableness of any such contention and the extreme length to which the prosecution went in the case at bar in urging the admission of circumstantial evidence, to convict the defendants.

See especially the testimony of Guy M. Campbell, a bartender in Longer's Saloon. (Transcript of Record, pp. 40-43.)

See, also, testimony of W. L. Walker. (Transcript of Record, pp. 33-34.)

VII.

The trial Court erred in not granting the motion made by counsel for the defendants to have the jury visit the premises at 4405 West Street, Oakland, California, where the defendant Karr and his family formerly resided. (See particularly Assignment of Error No. XXVI; Transcript of Record, p. 383.)

The trial court permitted such a mass of evidence to be introduced relating to the condition of the basement at 4405 West Street, Oakland, California, where defendant Karr and his family had formerly resided, and long after he had moved away and after the end of the conspiracy, if any there was, that, in justice to the defendants, the jury should have been permitted to have seen the premises for themselves.

A reading of the testimony of the Secret Service Operative Isadore Costanzo (Transcript of Record, pp. 104-110); of Chief Secret Service Agent Moffitt (Transcript of Record, pp. 296-301); of Paul Montfort, who denied that he was secretly employed by the Secret Service Agents (Transcript of Record, pp. 65-70; pp. 94-102); will show that, although the defendants were not charged with a conspiracy to manufacture counterfeit money, a studied and labored effort was made by the prosecution to convince the jurors that the defendants had a counterfeiting plant at 4405 West Street, Oakland.

It was for the purpose of dissipating any impression in the minds of the jurors that the basement of 4405 West Street, Oakland, California, could be used for such purpose, that counsel for defendants, on two

separate occasions during the trial of the case, earnestly requested the trial court to permit the jurors to see the place and be satisfied for themselves, which were refused. In this, we respectfully submit, the trial court was guilty of a gross abuse of discretion.

VIII.

The trial court erred in refusing to give instruction No. 8 as follows:

> "You are further instructed that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty and acquitted unless the fact of their, and each of their, guilt is proven beyond every reasonable doubt, to the actual exclusion of every reasonable hypothesis or theory of their innocence consistent with the facts proven."
>
> (See Assignment of Error No. LII; Transcript of Record, p. 390.)

Inasmuch as the evidence against the defendants was almost entirely circumstantial and in view of the character and nature of the testimony presented against them, we think that the rights of the defendants would have been better safeguarded by giving the requested instruction.

IX.

The trial court erred in refusing to give instruction No. 27 as follows:

> "You are instructed that the testimony of informers, detectives and other persons employed in hunting up testimony in criminal cases should be scrutinized and weighed more carefully than that

given by witnesses who are wholly disinterested, because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged."

(See Assignment of Error No. LIV, Transcript of Record, p. 391.)

The record will disclose that the only important evidence against the defendants emanated from informer Louis Stemmer (Transcript of Record, pp. 21-32; from Detective T. J. McKenzie (Transcript of Record, pp. 33-40); from Detective W. L. Walker (Transcript of Record, pp. 43-45); from Captain of Police Michael Finnell (Transcript of Record, pp. 114-116); from Secret Service Agents Moffitt (Transcript of Record, pp. 76-80, 80-94, 296-301); Foster (Transcript of Record, pp. 56-64); Costanzo (Transcript of Record, pp. 104-110); Paul Montfort (Transcript of Record, pp. 65-70, 94-102, 295-296), and from saloon men and bartenders.

In view of this class of evidence, we considered it highly important to the defendants that the jury should have been instructed as requested by us.

Without further prolonging this Opening Brief, we respectfully submit that a reversal must follow and the defendants be given a new trial.

Before this Appellate Tribunal can affirm the judgment of conviction now standing against the defendants, it must be *"able to say with certainty," "that the*

defendant was not prejudiced" by the rulings, remarks, instructions, irregularities and acts of misconduct on the part of the jurors and prosecution and trial court complained of by the defendants.

To use the apposite language of the Circuit Court of Appeals for the Eighth Circuit, in the case of *Balliet* v. *United States,* 129 Fed. Rep. 689, *696:*

> "Moreover, *we are not able to say with certainty, as we must be to uphold the verdict,* that the *defendant was not prejudiced by the instruction."*

As was well said by Judge Vann, in *People* v. *Wolf,* 183 N. Y. 464, *472,* 76 N. E. 592, *594:*

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial Judge. However strong the evidence against the defendant may be, if she did not have a fair trial, as shown by the rulings of the court, * * * the judgment of conviction should be reversed and a new trial ordered so that she may be tried according to law."

Respectfully submitted.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs in Error.

H. L. LEVIN,
Of Counsel.

APPENDIX

(ENVELOPE)

— Ontario (Canadian Stamps)

(Toronto
Sep 18
9:30 A.M.
1915)

Mr. O. S. York,
5333 - James Ave.
Oakland,
Calif.
U.S.A.

(U. S. DIST. COURT.
No. 5792.
U. S. v. York & Karr.
Deft. Exhibit No. "I" (for Ident).
Filed—Jan 21, 1916.
W. B. Maling, Clerk,
By Lyle S. Morris, Deputy Clerk.

(Envelope & Letter).

London, Ontario, Canada
Sept. 16 - 1915.

Dear Bro: & Family:—

I recd. your letter written to me in Columbus, Ohio. I had laid off and was on my way to find a

better job with better conditions, hence, the delay on reply. I was not quite making living expenses, let alone saving any thing on the Columbus job. I was the youngest man on extra list so naturaly stood to be cut off the list first which would not doubt be done in the next few weeks then the winter would be close and I would be out of employment, so I laid off and am looking for something better. I found from traveling there was nothing in the middle states or South, or east, so it was up to me to start north. Just ask Supt. of C. P. R. here but there isn't much doing now, so will keep on going and if I find nothing on my travels will probably go west into B. Columbua, then south again. Have had no trouble in traveling, as all conductors belong.

Now in regards to the main subject of your last letter, which you are not doubt waiting a reply, will state, that no doubt my reputation can carefully be checked back to may infantency and I am sure you or anyone else will find that it is clear and clean, that I was never arrested, never was connected with crooks (if I knew it) am not now, or never will be, if it can be prevented, have always worked for an honest living, am now, and expect I always will, as I have no education or training to make a living otherwise. I can't help what suspicion I am under, what Mr. Moffitt says he know, about me, or what he or any one else thinks or does, and am perfectly inocent of intentionaly or knowingly violating any law, my inocents being to this extent. I am not the least bit affraid to converse, correspond or meet any one in the workd upon any

subject concerning my caracter or doings, I have already been detained at Columbus and taken up for investigation charged, or accused of being a wire tapper, of which I believe I wrote you. Me or any one else is subject to subject to such things, but why fear the law or any man if one know in his own heart and soul he is inocent of any and all charges placed against him.

I always saved my money, to the extent that I had quite a little start in life, and I know this caused jelously among my so called friends, I did not see the peace in the paper about me, you spoke of, but feel sure if there was one there must of been some scandal among the railroad knockers.

Mr. Moffett, or any of the law enforcers of the world, certainly must be mistaken regarding me, as they no doubt have been mistaken before in their career.

I will keep you posted in future of any where abouts, and it will be my wish, if any one desires to know where I am or what I am doing, for you to readly give all information concerning me & my where abouts so as to assist in clearing the cloud of suspecion which you say hangs over me.

I have now given you all the information I posess concerning the above case, and you need not worry that my actions or conduct will, intentionaly ever bring disgrace upon you, your family or our dear old father & mother who, I feel are always proud of us two boys.

Of course, one could be picked up on suspicion in

this country also, on acct. of the war conditions, etc., but why should I worry when I know I have done no injustice to anyone.

Knowing you was never in this country I will explain to you some of the conditions I find in this location a rich nice clean country with a fine clean race of people, very polite, etc. From what I can learn the railroad conditions far exceed that of the states, to the extent that one with a good service letter with a conductors experiance can hire out right as conductor, the big grain rush is now on further north and I hear they need men, so I can see no reason why I should not meet with success.

I can't give you definite address at this writing but will drop you a line often.

This traveling is no pleasure I assure you, & hope you never have any faily troubles that would cause one to get the bumps I have experienced.

As ever, I remain your

Bro with love to all.

Rol.

(NO. 5794.
U. S. vs. York & Karr.
(Part) Deft. Exhibit No. "I" (for Ident).
(5 pages)
1/21/16 LSM. Deputy Clerk.

APPENDIX.

INDEX OF WITNESSES

As Contained in Transcript of Record.